TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1925

No. 828

MARION L. FROST AND WESLEY H. FROST, CO-PARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF FROST & FROST TRUCKING COMPANY, PLAINTIFFS IN ERROR,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED DECEMBER 3, 1925

(31,561)

(31,551)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 828

MARION L. FROST AND WESLEY H. FROST, CO-PARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF FROST & FROST TRUCKING COMPANY, PLAINTIFFS IN ERROR,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1925

[fol. 1] **IN SUPREME COURT OF CALIFORNIA**

MARION L. FROST and WESLEY H. FROST, Copartners, Doing Business under the Name and Style of Frost & Frost Trucking Company, Petitioners,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and A. J. HAPPE, Respondents

PETITION FOR WRIT OF REVIEW—Filed December 12, 1924

To the Honorable the Supreme Court of the State of California:

Come now the petitioners above named, and file this, their petition for a Writ of Review, respectfully showing:

I

At and during the times hereinafter mentioned, the petitioners, Marion L. Frost and Wesley H. Frost were copartners doing business under the name and style of Frost & Frost Trucking Company.

II

At and during the times hereinafter mentioned, the respondent, Railroad Commission of the State of California, was and now is a Commission organized and constituted under and by virtue of the laws of the State of California.

III

That on or about the 4th day of February, 1924, there was filed with said Commission, an instrument in writing, therein and hereinafter denominated a "complaint", a copy of which is hereunto attached, marked Exhibit "A" and is made a part hereof; and that these petitioners were named in said complaint as parties defendant.

IV

That, thereafter, on or about February 19th, 1924, said Commission made a purported order, directed to each of

petitioners, notifying them of the filing of said complaint, [fol. 2] and requiring them, in the words and language of said order "to satisfy the matters therein complained of, or to answer said complaint in writing within ten (10) days from the service upon you of this order." Said order, together with a copy of said complaint was served upon each of petitioners, who thereupon, without submitting to the jurisdiction of said Commission, filed with said Commission, instruments in writing, therein and hereinafter denominated as "answer", a copy of the said answer of petitioner Wesley H. Frost being hereunto attached, marked Exhibit "B" and made a part hereof. That a similar answer was filed by petitioner Marion L. Frost, and a like answer filed on behalf of these petitioners named as defendants in said complaint as "Frost & Frost Trucking Company."

V

Thereafter, on April 7th, 1924, a purported hearing was held by said Commission upon said complaint, these petitioners appearing at said hearing but denying the jurisdiction of said Commission in the premises, or over these petitioners.

VI

Thereafter, on August 20th, 1924, said Commission made and filed, a purported opinion and order in said matter, a copy of which is hereunto attached, marked Exhibit "C" and is made a part hereof; and a copy of the lease dated December 14th, 1923, referred to in said opinion and order is likewise hereunto attached, marked Exhibit "D", and is made a part hereof.

VII

Thereafter, and within twenty days from August 20th, 1924, and before said purposed order of said Commission became or was effective, these petitioners filed with said Commission, an application for rehearing in said matter, a copy of which said application so made and filed is hereunto attached, marked Exhibit "E" and made a part hereof, and is referred to as fully as though here set forth [fol. 3] in full.

VIII

That thereafter, on September 13th, 1924, said Commission made its order, whereby it ordered that said petition for rehearing be granted, a copy of which said order last mentioned is hereunto attached, marked Exhibit "F" and is made a part hereof.

IX

That thereafter a rehearing was had in said matter, at which no evidence was introduced or heard, and thereafter, on November 12th, 1924, said Commission made its order, wherein and whereby it purported to affirm its said order made August 20th, 1924, a copy of which said order so made November 12, 1924, being hereunto attached, marked Exhibit "G" and being made a part hereof.

X

Petitioners aver that said order of said Commission made November 12th, 1924, and said order made August 20th, 1924, were and are, and each of them was and is, unlawful, for the reasons set forth in said application for rehearing, reference to which is hereby made for a particular statement of the same.

XI

Petitioners aver that the evidence adduced before said Commission, at said hearing in said matter, affirmatively showed, without conflict, that the trucks owned and controlled by petitioners, were used solely in transporting over the public highways, the fruit and property owned by Redlands Orange Growers Association, under the said contract between it and these petitioners, dated December 14th, 1923; and there was no evidence adduced before said Commission, at said hearing, or otherwise, that these petitioners owned, or controlled, or operated, or managed any automobile, jitney bus, auto truck, stage or auto stage, for any purpose whatsoever, or over any public highway whatsoever, other than said trucks and said operations for trans-[fol. 4] porting said property owned by said Redlands Orange Growers Association, pursuant to and under said contract dated December 14th, 1923.

Wherefore petitioners pray that this Honorable Court inquire into and determine the lawfulness of said orders of said Railroad Commission of the State of California, made August 20th, 1924, and November 12th, 1924, hereinbefore referred to, and for that purpose, a Writ of Review issue to said Commission in the manner provided by law, and that a hearing be had thereon, and upon said hearing, said orders and each of them may be declared void and be set aside; and for such other and further relief as to the Court seems proper.

Marion L. Frost and Wesley H. Frost, Co-partners, Doing Business under the Name and Style of Frost & Frost Trucking Company, by Marion L. Frost, Petitioners. Leonard, Surr and Hellyer, Attorneys for Petitioners, San Bernardino, California.

Duly sworn to by Marion L. Frost. Jurat omitted in printing.

[fol. 5] EXHIBIT "A" TO PETITION

Filed Railroad Commission, State of California. Feb. 5, 1924. Case No. 1796. H. G. Mathewson, Secretary.

A. J. HAPPE, Complainant,

vs.

REDLANDS ORANGE GROWERS ASSOCIATION, Dwight C. Lefferts, Frost & Frost Trucking Company, Marion L. Frost, Wesley H. Frost, Jos. A. Patterson, Defendants.

Complaint

The complaint of the above named complainant, A. J. Happe, respectfully shows:

That complainant is an individual engaged in the operation of automobile trucks for hire under the fictitious name of A. J. Happe Transfer Company, and that his post office address is 339 Orange Street, Redlands, California.

That the names and post office addresses of the defendants, and each of them are as follows:

Redlands Orange Growers Association, Redlands, California.

Dwight C. Lefferts, 820 West Highland Avenue, Redlands, California.

Frost & Frost Trucking Company, 9 East Central Avenue, Redlands, California.

Marion L. Frost, 239 Chestnut Avenue, Redlands, California

Wesley H. Frost, 208 East Olive Avenue, Redlands, California.

Jos. A. Patterson, 427 Cajon Street, Redlands, California.

That complainant herein is engaged in the business of owning and operating automobile trucks for the transportation of property as a common carrier for compensation over regular routes between the so-called Redlands-Highlands district of San Bernardino County, California, and the city of Los Angeles and Los Angeles Harbor points (Wilmington and San Pedro), and as such is subject to the jurisdiction of your honorable body and to the provisions of Chapter 213 of the Statutes of 1917, as amended.

That by decision No. 12422 of your honorable body, issued under date of July 1923, the complainant herein was granted a certificate of public convenience and necessity to operate an automobile truck for the transportation of certain commodities specified therein, including among other commodities citrus fruits, fertilizer, box shook, packing house supplies and empty containers between the so-called Redlands-Highlands district and the city of Los Angeles and Los Angeles Harbor points. Acceptance of this certificate was filed with your honorable body on August 3, 1923, tariffs naming the rates to be charged for the services of transportation authorized in said decision were filed with the commission, on August 10, 1923, since which time the complainant has held himself out to operate as a transportation company and/or as a common carrier, has actually so operated, said operations having been conducted in accordance with the rules and regulations promulgated by your honorable body and subject to its supervision and jurisdiction, which rules and regulations with respect to its operations, have at all times been complied with by the complainant herein.

That complainant believes, and upon such belief alleges, that the defendants and each of them for some time past, the exact time being unknown to complainant, but more particularly for the sixty (60) days prior to the filing of this complaint have been engaged in the business of owning, controlling, operating or managing automobiles or/and auto trucks "used in the business of transportation of property, or as a common carrier, for compensation" over public highways in this state between fixed termini or over a regular route, as said terms are described and more fully defined and set forth in Chapter 213 of the Statutes of 1917, as amended and more particularly the transportation of citrus fruits between packing houses in the Red-[fol. 6] lands-Highlands district and the city of Los Angeles and Los Angeles harbor points, and that defendants and each of them are "transportation companies" and/or common carriers as described and set forth in the Statutes hereinbefore referred to, and more particularly section 1 (c) thereof.

That as transportation companies and/or as common carriers the defendants and each of them, has been and now is engaged in the business of transporting property, or as a common carrier, or common carriers for compensation, over public highways in the State of California, by automobile or auto truck, between fixed termini or over regular routes, not exclusively within the limits of an incorporated city or town, or of a city and county, all as defined and set forth in Chapter 213 of the Statutes of 1917, especially section 1 (c) and (e) thereof, and more particularly engaged in the transportation of citrus fruits between packing houses in the Redlands-Highlands district and the City of Los Angeles and Los Angeles Harbor points and that the defendants have actually transported such property for compensation, and actually received compensation for such service of transportation performed in the manner indicated.

That defendant's operations as a transportation company, or transportation companies, or as a common carrier or common carriers, all as above described, have been and now are, conducted in violation of Chapter 213 of the Statutes of 1917, as amended, and more particularly sections 2 and 5 thereof, and the rules and regulations of the Railroad Com-

mission of the State of California promulgated in conformity with said Statutes, in that the defendants and/or each/or any of them were not actually operating in good faith between the Redlands-Highlands district and the city of Los Angeles and Los Angeles Harbor points on or prior to May 1, 1917 and that they have not since that date applied to and obtained from your honorable body a certificate declaring that public convenience and necessity require such operation, as provided in Chapter 213 of the Statutes of 1917, as amended, and more particularly section 5 thereof; and that the said defendants and each of them, have not otherwise acquired such certificate of public convenience and necessity by purchase, assignment, lease, transfer, inheritance, or in any other manner, and that the defendants, and each of them, have not in the past, and do not now own, hold or possess any such certificate of public convenience and necessity, or any right, privilege, franchise or permit to operate a transportation company, or as a common carrier between said points, as said term "transportation company" is defined in Chapter 213 of the Statutes of 1917, as amended.

The defendant's operations as a transportation company, or transportation companies, or as a common carrier or common carriers, between the Redlands-Highlands district, the city of Los Angeles and Los Angeles Harbor points (Wilmington and San Pedro) are in violation of the constitution of the State of California, and more particularly section 22 of Article XII thereof, in that the defendants, and each of them have not filed with your honorable body a tariff or tariffs naming rates of charges for the transportation of freight by motor truck over public highways of this state between the points named in this complaint, or for any service in connection therewith, as provided in section 22 of Article XII of said constitution.

That as a result, or consequence, of the operations by the defendants and each of them as a transportation company, and/or as a common carrier, which operations are herein alleged and believed to be unlawful, the complainant has suffered great damage and will continue to suffer great damage in that he has lately purchased equipment in addition to that owned and operated by him prior to July 3, 1923 (on which date there was granted to him by your honorable body the certificate of public convenience and necessity

hereinbefore referred to), in order that he might be prepared at all times to promptly and properly transport such commodities as were tendered him by the shipping public and as came within the purview of that certificate or franchise, which equipment, because of the unlawful operations of the defendants, remains idle a considerable part of the time at great expense to the complainant. Furthermore, complainant is unlawfully deprived of tonnage, more particularly of citrus fruits, and the revenue to be derived from the haulage of same, which tonnage and revenue would accrue to the complainant, an authorized carrier operating under the jurisdiction and regulations of your honorable body, were it not for the unlawful operations between the points named of defendants to whom the tonnage and revenue of which complainant is deprived is unlawfully di-
[fol. 7] verted and paid, and will continue to be diverted and paid.

Wherefore complainant asks that the defendants, and each of them be required to answer the charges herein, that the complaint be set for hearing at the earliest possible date, that after such hearing the Commission enter its order finding that the defendants and each of them are engaged in the business of transportation of property, and are operating as a transportation company, or as a common carrier, for compensation, over public highways in the State of California, between fixed termini or over a regular route, and not exclusively within the limits of an incorporated city or town, or of a city or county; and more particularly between the Redlands-Highlands district and the city of Los Angeles and Los Angeles Harbor points (Wilmington and San Pedro), that such operations are subject to the jurisdiction of your honorable body; that no certificate of public convenience and necessity has been applied for or issued to the defendants or any of them; that no such certificate of public convenience and necessity has been in any other manner acquired by the defendants, or any of them; that the operations of defendants are in violation of Chapter 213 of the Statutes of 1917; and that an order or orders be entered directing and requiring that the defendants, and each of them, immediately and forthwith cease and desist from the violations of law herein complained of, and further directing and requiring the defendants and each of them, immediately and permanently, to discontinue transporting freight

as a transportation company for hire or for compensation, or as a common carrier for hire or for compensation by automobiles or auto trucks, between the points herein named, and more particularly between the Redlands-Highlands district of San Bernardino County, State of California, and the city of Los Angeles and Los Angeles Harbor points (Wilmington and San Pedro), and that the commission enter such further order or orders as to it may seem just and proper under the circumstances.

Dated at Los Angeles, California, this 30th day of January, 1924.

A. J. Happe, Richard T. Eddy, Attorney- for Complainants, 1021-1023 Pacific Finance Bldg., Los Angeles, California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. J. Happe, being first duly sworn, deposes and says: that he is the complainant in the action entitled as above; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

A. J. Happe.

Subscribed and sworn to before me this 30th day of January, 1924. E. Lawrence, Notary Public in and for the County of Los Angeles, State of California.

[fol. 8] EXHIBIT "B" TO PETITION

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Case No. 1976

Answer of Wesley H. Frost

Comes now Wesley H. Frost, named as a defendant in the above entitled proceeding, and without waiving objections that said complaint does not state a cause of action, and

that the Honorable Commission is without jurisdiction in the premises, and without submitting to the jurisdiction of said Honorable Commission except for the limited purpose of filing this instrument, herein denominated an answer, but expressly denying that the Honorable Commission has jurisdiction over the matter, or over this defendant; and further objecting that the proceeding is in violation of Section 13 of Article I of the Constitution of the State of California, and of the Fifth Amendment to the Constitution of the United States, and that in being required by the Honorable Commission to answer the alleged complaint under oath the defendant is compelled to be a witness against himself, and stating this defendant will claim immunity for all further or other prosecutions, makes reply to the allegations of the alleged complaint, as follows:

Denies that defendants or this defendant have, during the times alleged in said complaint, or ever, or at all, been engaged in the business of owning, or controlling, or operating or managing automobiles or auto trucks used in the business of transportation of property, or as a common [fol. 9] carrier, for compensation, at any place or at all, or more particularly, or in any manner, for the transportation of citrus fruits, between the places alleged in said complaint, or at all. Denies that the defendants are, or this defendant is, a "Transportation Companies," or "Common carriers," as alleged in said complaint, or at all.

Denies that as transportation companies, or as common carriers, the defendants or this defendant has been or now is engaged in the business of transporting property, or as a common carrier, or common carriers, for compensation over public highways in the State of California, by automobile, or auto truck, or at all, between fixed termini, or over regular routes, or at all. Denies that the defendants, or this defendant, have actually received compensation for the alleged service of transportation performed in the manner alleged to be indicated, or at all.

Denies that defendants' operations of the character alleged in said complaint, or any operations or acts of defendants, or this defendant, have been or are conducted in violation of the provisions of law referred to in said complaint, or any provisions of law whatsoever.

Denies that defendants' alleged operations, or any operations of defendants, or of this defendant, are in violation of

the constitution of the State of California, or any section thereof, for any alleged reason whatsoever.

Denies that by reason of any alleged operations of defendants, or of this defendant, or by reason of any acts of defendants, or of this defendant, that complainant has suffered or will suffer great or any damage whatsoever.

Wherefore this defendant prays that said complaint be dismissed.

Wesley H. Frost, Defendant. Leonard, Surr & Hellyer, Attorneys for Defendant.

Address: San Bernardino, California.

[fol. 10] STATE OF CALIFORNIA,
County of San Bernardino, ss:

Wesley H. Frost, being first duly sworn, deposes and says:

That he is the defendant in the action entitled as above; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

Wesley H. Frost.

Subscribed and sworn to before me this 25th day of February, 1924. H. H. Wells, Notary Public in and for the County of San Bernardino, State of California. (Notarial Seal.)

[fol. 11] EXHIBIT "C" TO OPINION

Decision No. 13945

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Case No. 1976

Richard T. Eddy, for the complainant.

Leonard, Surr & Hellyer, by G. W. Hellyer, for defendants.

F. M. Hodge, for Hodge Transportation System, intervenor on behalf of complainant.

Opinion

SHORE, Commissioner:

The complaint in this matter, filed February 4, 1924 by A. J. Happe doing business under the fictitious name of A. J. Happe Transfer Company, alleges that complainant is operating automobile trucks for the transportation of property between the Redlands-Highlands District and Los Angeles Harbor points as a common carrier under a certificate of public convenience and necessity issued by this Commission; that the defendants, and each of them, for a period of sixty (60) days preceding the filing of the complaint had been, and on that date were, operating as a transportation company transporting citrus fruits from the Redlands-Highlands District to Los Angeles Harbor points, without having obtained a certificate of public convenience and necessity, and in violation of the provisions of the Auto Stage and Truck Transportation Act, and to complainant's great and irreparable injury.

[fol. 12] Answers were filed by each of the defendants objecting to the jurisdiction of the Commission over either the subject matter of the complaint or over the persons of the defendants. Defendants alleged that the proceeding was in violation of Sec. 13, Art. 1 of the California Constitution and Amendment 5 of the United States Constitution, declared that they submitted to the jurisdiction of the Commission only for the limited purpose of filing their answers, and denied that they were a tranportation company or com-

mon carrier or that they were engaged in the business of transporting property for compensation between fixed termini, or over a regular route, or that their operations were in violation of law, or that by reason of their acts the complainant had or would suffer any damage whatsoever.

A public hearing was held upon the matter in Los Angeles on April 7th, 1924, at which time evidence, oral and documentary, was presented, the matter was submitted and is now ready for decision.

At the hearing counsel for defendants objected to the calling of any of the defendants to the witness stand upon the ground that no person could be compelled to be a witness against himself, and asked that each of the defendants when so called and sworn be instructed that he could decline to answer on the ground that his answers might tend to incriminate him. Notwithstanding these claims of constitutional immunity, and over the express objection of their counsel, three of the defendants, Dwight C. Lefferts, Wesley H. Frost, and Jos. A. Patterson, were sworn and testimony was elicted from them concerning their alleged violation of the Auto Stage & Truck Transportation Act.

The Commission deems it proper to say at this point that it recognizes the validity of defendants' right in this proceeding to refuse to testify on the grounds of self-incrimination. The inquiry herein conducted involved an alleged [fol. 13] violation of the Auto Stage & Truck Transportation Act, which by the terms of Sec. 8 thereof, is made a misdemeanor punishable by fine or imprisonment or both. Said Act contains no immunity provisions. The Commission therefore, desires to state that for the purposes herein involved, and for all other purposes, it has wholly disregarded all the testimony given by defendants, Dwight C. Lefferts, Wesley H. Frost, and Jos. A. Patterson; that it has treated the same as if stricken from the record; and that it has based its findings and order, hereinafter set forth, solely upon the testimony and exhibits of the complainants, and upon the statements and exhibit offered by counsel for defendants. In order that it may be clear upon exactly what testimony each statement of fact herein contained is based, we shall depart from our usual custom and in this opinion cite the reference in the transcript to the testimony covering such facts.

A. J. Happe, the complainant, testified (Tr. p. 45) that under certificate from this Commission dated July 31st, 1923, he was operating an automobile truck line hauling citrus fruits from the Redlands District to Los Angeles Harbor points; that he had not hauled any fruits between said points for the defendant Redlands Orange Growers Association since the beginning of the present orange shipping season, to-wit: since December 1st, 1923, but that defendant Redlands Orange Growers Association had in fact moved its fruit from its packing house in Redlands via Valley Boulevard to El Monte thence via Clearwater to the Harbor and that he had a complete record of said movements from January 29th to April 7th, 1924; that said record was obtained, partly by his own men and partly by representatives of intervenor, Hodge Transportation System, by checking the equipment when it was loaded at the Redlands end and by again checking it at the Harbor (Tr. p. 47, 48, 53); That said record showed the license numbers of the trucks which transported said packed fruit and also the supposed owners of said trucks. Complainant then offered records of these checks in evidence as his Ex-[fol. 14] hibits 1 and 2 and they were admitted by counsel for defendant to be a correct résumé of the use of the trucks in question (Tr. p. 56).

Complainant's Exhibit No. 1, shows that during the months of February and March, 1924, certain trucks of the defendant, Frost and Frost Trucking Company, hauled packed fruit from the Redlands Orange Growers Association on forty-four (44) separate occasions, being in many instances on consecutive dates and never with more than a three day interval between trips, and that on twenty-seven (27) separate occasions during that time a certain truck of defendant Jos. A. Patterson hauled packed fruit from the Redlands Orange Growers Association. The defendants made no denial of the fact that all these loads of packed citrus fruit went to Los Angeles Harbor points, as alleged and testified to by complainant. Complainant's Exhibit No. 1, also shows that on two occasions during that period of time certain trucks of defendant Frost and Frost Trucking Company hauled paper to Redlands for defendant Redlands Orange Growers Association; nor do the defendants deny that said paper was hauled from the Los Angeles District.

Complainant's Exhibit No. 2 shows that from January 29th, to March 26th, 1924, loaded packed fruit was hauled from the Redlands Orange Growers Association's packing house by certain trucks of one Emil Suess on seven (7) occasions; by certain trucks of Davenport & Stut on four occasions; and by certain trucks of one Stacy on three occasions.

Counsel for the defendants, declaring that he would "like to make a statement that might be helpful to clearly getting facts before the court," stated (Tr. p. 43) that the defendants had a lease or agreement dated December 14, 1923, between M. L. Frost and W. H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, and the Redlands Orange Growers Association. [fol. 15] A copy of this alleged "lease" was submitted by defendants' counsel, and was received in evidence as Defendants' Exhibit No. 1. Counsel for defendants then stated that Dwight C. Lefferts, the Manager of the Redlands Orange Growers Association, would testify that all fruit which the Redlands Orange Growers Association have moved to the Harbor since December 14th, 1923, was delivered to Frost & Frost Trucking Company pursuant to said lease or agreement, and that the Redlands Orange Growers Association and not any buyer, had paid Frost & Frost for all the hauling they had done. He further stated that either of the Frosts would testify that said agreement had been lived up to (Tr. p. 43 and 44). In short, counsel for defendants stipulated that since December 14, 1923, all packed citrus fruits of the Redlands Orange Growers Association had been hauled to the Harbor by the Frost & Frost Trucking Company pursuant to said alleged "lease" or agreement.

The Commission thus having before it an admitted transportation of property by automobile between fixed termini and over a regular route for compensation, it becomes necessary to determine whether defendants' justification therefor, to-wit: the alleged "lease" or agreement, is sufficient to take said transportation out of the operation of the Auto Stage and Truck Transportation Act.

Defendants' exhibit No. 1 is a document termed a "lease." It is dated December 14th, 1923, and is executed by M. L. Frost and W. H. Frost, co-partners doing busi-

ness under the name and style of "Frost & Frost Trucking Company, termed parties of the first part, and Redlands Orange Growers Association, a corporation, termed second party. Its recital clauses set forth that the Association is engaged in the business of packing and marketing citrus fruits in San Bernardino County, and in such business transports considerable property principally citrus fruits, from the ranches where grown to the packing houses, and thence from the packing houses to the wharves at San Pedro and Wilmington. It also transports fertilizer [fol. 16] and other farming supplies from its packing house to the ranches of its members, and wrapping paper and other supplies from Los Angeles to its packing houses; it is further recited that the Frosts are the owners of several trucks and trailers and are skilled in transporting property of the nature mentioned; that the Association desiring to secure the maximum efficiency in the conduct of its business by insuring the expeditious transportation of its said property, deems it advisable to conduct and operate its own transportation system and desires to lease certain trucks and trailers owned by the Frosts and to secure their services, when desired, in the operation and care of said trucks and trailers. The instrument then purports to lease, to the Association from the Frosts, four specific trucks and trailers, described by name of manufacturers and by California License number upon certain terms and conditions until June 30th, 1924. It is stated in this document that the Frosts are to give the sole and exclusive possession and use of these four trucks and trailers to the Association and the Frosts agree that they shall be used by them for no other purpose than for transporting the property of the Association. All repairs to the trucks and trailers are to be made at the expense of the Frosts and all oil, gas and other supplies therefor are to be furnished by them. They are fully to indemnify and protect the Association from all liability for negligence in the operation of the trucks and to pay all claims arising against the Association. In case of breakage or wear incapacitating any of the trucks the Frosts are to furnish other trucks, and in case the trucks specified in the agreement "shall be insufficient to transport all of the property that second party (the Association desires to transport" the Frosts are immediately

to furnish additional trucks and trailers sufficient for needs of the Association, and the same are then to be deemed to [fol. 17] be leased and held and used by the Association pursuant to the terms of the agreement. In addition, the Association agrees to pay the Frosts weekly the reasonable value of the use of said trucks together with all services rendered by the Frosts, and it is provided that

"* * * such reasonable value shall be based upon and determined by the nature and weight of the property transported * * *, and the distance transported, and shall not be greater than the customary charge for similar services in the neighborhood."

The Association agrees, upon the termination of the term or sooner determination of the "lease," to return all the said property to the Frosts, "damage by fire, elements or other cause excepted," and it is added that the Association shall not be liable for depreciation or damage to said trucks from use, operation or other cause. It is of importance to note that the agreement is terminable at any time at the option of the Association.

It is apparent that this instrument, when construed in connection with the explanatory remarks of counsel for defendants made at the hearing herein, bears none of the characteristic features of a true "lease." Not only does the alleged "lessee" fail to agree to indemnify the "lessor" for damage or injury to the "leased" property during the terms of the "lease," but the agreement expressly repudiates any and all liability for depreciation or damage, and exacts from the "lessor" full indemnity and protection from all claims that may arise against the "lessee" in connection with its liability to others during the transportation in question. Moreover, the so-called "lessors" are to drive the trucks themselves when requested by the "lessee" or to furnish drivers therefor at their own expense, and in addition are to make all repairs and keep the property in good order and workable condition and are also to furnish all oil, gas and other supplies that may be necessary for their operation, for all of which the "lessee" is to pay to the "lessors" not a certain, definite and specified rental for [fol. 18] the term of the agreement, but rather an amount based on the nature and weight of the property transported,

and the distance transported, but not greater "than the customary charge for similar services in the same neighborhood." While consideration for a true "lease" might possibly be made dependent upon the property transported, a point which it is not necessary here to determine, it is evident that there is not sufficient certainty to the consideration here mentioned to make possible a determination at any particular time of the consideration payable for any particular period or service. The maximum consideration is made dependent upon the "usual" charges of others in the neighborhood, but no actual consideration capable of mathematical determination at any time is mentioned in this so-called "lease." Whatever consideration might actually be paid for any particular transportation service could be arrived at only by further negotiation and agreement between the parties. The so-called "lease" can hardly be considered other than an agreement to move the Association's crop.

That the parties to this instrument did not intend it to be a bona fide "lease," nor to be so considered between themselves, but rather that they intended it as a mere contract for trucking service seems further demonstrated by their effort to include within the terms of the agreement any number of additional trucks "sufficient for the needs" of the Association. As defendants' counsel stated at the hearing (Tr. p. 44) "upon a few occasions their own four trucks were insufficient to move the amount of fruit that the Redlands Orange Growers had to give them and they temporarily leased and substituted other trucks that hauled a total of six loads." Again counsel stated (Tr. p. 57) "And I will offer this statement * * *, upon certain occasions Frost and Frost procured additional equipment to carry out their agreement with the Redlands Orange Growers Association, and upon four occasions" the Davenport truck (Tr. p. 58) "was used in carrying out the contract between [fol. 19] Frost and Frost and the Redlands Orange Growers Association." There can be but one logical interpretation placed upon these statements and that is that the procurement of additional equipment by Frost & Frost was not for the purpose of carrying out their agreement to "lease" four specific trucks and trailers to the Redlands Orange Growers Association, but, as the instrument itself clearly

indicates, to carry out their contract to move the latter's fruit crop. As counsel again states (Tr. p. 57): "It might further be said there are six, seven or eight other trucks which were leased for a trip, or a period of time by Frost and Frost. They do, your Honor will understand, an extensive business and lease trucks. When they have insufficient trucks to carry out or to supply the needs of the Orange Growers Association, pursuant to the terms of that lease, that is, these other trucks as I stated the extent of this morning." This, it appears, is the explanation of the use of the trucks of Suess, Stacy, and Davenport and Stutt. When the demands of the Redlands Orange Growers Association exceed the capacity of the four trucks and trailers named in the so-called "lease," Frost & Frost hired additional equipment to carry out their contract to move the Association's crop. Finally although the term named in the agreement is to end on June 30th, 1924, it is, by paragraph ten made terminable at any time at the option of the Association.

From a careful consideration of the matters set forth above and these matters alone, and with entire disregard of the testimony elicited from the defendants, Dwight C. Lefferts, Wesley H. Frost and Jos. A. Patterson, the Commission is of the opinion that the agreement executed December 14th, 1923, by Frost & Frost Trucking Company and Redlands Orange Growers Association is not a bona fide "lease" of trucking equipment, but is in truth a mere contract between the parties for a type of trucking service falling within the provisions of the Auto Stage & [fol. 20] Truck Transportation Act (Stats. 1917, Chap. 213, as amended). No certificate of public convenience and necessity having been obtained by defendants to cover such operation, it should cease until such certificate has been granted.

The objection of defendants that the issues herein presented are not such as fall within the jurisdiction of the Railroad Commission is met by this Commission's Decision in Bolton & Bennetts vs. Olson and Rouch and Williams, Decision No. 12700, and in Motor Transit Co. vs. Lingo Bros., Decision No. 12907, wherein it was held that by the legislative mandate contained in subsections (c) and (e) of Section 1 and in Section 5 of the Auto Stage & Truck Transportation Act (Chapter 213, Statutes of 1917, as

amended) this Commission is required to take jurisdiction over the matters which are issues in such a proceeding as this and to decide such issues upon the facts as ascertained from the record.

Order

A public hearing having been held in the above entitled proceeding and the matter having been duly submitted, the Commission being now fully advised, hereby finds as a fact that the defendants Marion L. Frost and Wesley H. Frost, a co-partnership, doing business under the name and style of Frost & Frost Trucking Company, have been and now are, engaged in the operation of auto trucks over the public highway, for compensation, between fixed termini and over regular routes; that neither said co-partnership nor said defendants, or either of them has obtained from this Commission a certificate declaring that public convenience and necessity require such operations; the Commission further finds that the evidence does not show that defendants Redlands Orange Growers Association, Dwight C. Lefferts, and Jos. A. Patterson are engaged in the opera- [fol. 21] tion; the Commission further finds that the evidence does not show that defendants Redlands Orange Growers Association, Dwight C. Lefferts, and Jos. A. Patterson are engaged in the operation of auto trucks over the public highway, for compensation, between fixed termini and over regular routes.

And basing its conclusion upon the findings of fact and statements of the within opinion, the Commission hereby concludes that the said operation of Marion L. Frost, Wesley H. Frost and Frost & Frost Trucking Company should be discontinued pending the receiving of such a certificate as provided by Chapter 213, Statutes of 1917, as amended, and to that end

It is hereby ordered that the said defendants, Marion L. Frost, Wesley H. Frost, and Frost & Frost Trucking Co., be, and they are hereby directed to cease and hereafter to desist from any and all such transportation either individually or as a co-partnership unless and until they shall have secured from this Commission a certificate that the public convenience and necessity require the resumption or continuance thereof; and

It is hereby further ordered that the Secretary of this Commission be, and he is hereby directed to serve or cause to be served upon said defendants and each of them a certified copy of this decision; and

It is hereby further ordered that the Secretary of this Commission be, and he is hereby directed to forward to the District Attorneys of the counties in which such operations have been carried on, a certified copy of this Decision; and

It is hereby further ordered that the complaint against defendants Redlands Orange Growers Association, Dwight C. Lefferts and Jos. A. Patterson be and it is hereby dismissed.

The foregoing Opinion and Order are hereby approved and ordered filed as the Opinion and Order of the Railroad Commission.

[fol. 22] Dated at San Francisco, California, this 20th day of August, 1924.

C. L. Seavey, Irving Martin, Edgerton Shore, J. T. Whittlesey, Commissioners.

[fol. 23] EXHIBIT "D" TO PETITION

Lease, made this 14th day of December, 1923, by and between M. L. Frost and W. H. Frost, co-partners doing business under the name and style of "Frost and Frost Trucking Company," parties of the first part, and Redlands Orange Growers' Association, a corporation, second party,

Witnesseth, That:

Recitals

1. Second party is engaged in the business of packing and marketing citrus fruits in the County of San Bernardino, and in such business transports considerable property from place to place, chief among which are the following, to-wit:

(a) The transporting of citrus fruits from the ranches where grown to the packing houses of second party;

(b) The transporting of packed citrus fruits from its packing houses to the wharves at San Pedro and Wilmington, Los Angeles County, for shipment on board vessels without the State of California.

(c) The transporting of fertilizers and other farming supplies to the ranches of its members and persons supplying fruits to it for packing and marketing.

(d) The transporting of wrapping paper and other supplies, owned by it, from Los Angeles and other places to its packing houses in said County of San Bernardino.

2. First parties are the owners of several trucks and trailers, which they have heretofore been using in their business, and first parties are skilled in the operation of trucks and transporting property of the nature required to be transported by second party in the conduct of its said business.

3. Second party desires to secure the maximum efficiency in the conduct of its business by ensuring the expeditious [fol. 24] transportation of its said property, and for such purpose deems it advisable to conduct and operate its own transportation system, and therefore desires to lease, for use in such business, certain of said trucks and trailers so owned by first parties, and to secure the services of first parties when desired, in the operation of said trucks and trailers, and in the care thereof.

Now, therefore, it is agreed as follows:

1. First parties do hereby lease and hire unto second party, and second party hires and takes from first parties, for the term hereinafter expressed, upon the terms and conditions hereinafter set forth, four trucks and four trailers, described and identified as follows:

1 Mack truck, California 1923 license #25469.
1 Mack truck, California 1923 license #25468.
1 White truck, California 1923 license #43696.
1 White truck, California 1923 license #28422.
4 trailers for same, California 1923 license numbers, respectively, M-25075; M-31982; GN-7657; and GN-2686.

2. The term of this lease and hiring shall begin upon the date hereof and end on the 30th day of June, 1924, unless sooner terminated.

3. Second party shall be entitled to the sole and exclusive possession and use of said leased property, for use in the transportation of property in its said business; and it is understood and agreed that said leased property shall be

used for no other purpose, and that if said trucks, or any of them, are at any time in the physical custody of first parties, for purposes of operation, storage or repairs, or any other purpose, the legal use and possession of said property is solely in second party, and first parties shall not in any manner use or employ said leased property for any business conducted by them, or in transporting the property of others.

[fol. 25] 4. First parties agree to make all repairs to said trucks that may be necessitated by their use by second party, and first parties agree to keep said leased property in good order and workable condition; also, to furnish all oil, gas and other supplies that may be necessary for their operation.

5. First parties further agree, when requested by second party, to drive or operate said trucks themselves, or to furnish, at their expense, competent drivers who shall operate said trucks, but first parties, and any persons engaged by them, while operating said trucks, and said trucks and trailers shall at all times be under the direction and control of second party.

6. It is understood that second party will be liable, in the event of negligence in the operation of said trucks, regardless of by whom actually driven, for injury to the person and property of others; but second parties agree to fully indemnify and protect second party in its liability to others, and to pay all claims against said second party arising while said property is being driven by first parties, or either of them, or any driver employed by them, or on account of any defect in the leased property.

7. If said leased property, or any part of it, shall become or be broken, or worn out, or shall be insufficient or become insufficient, for any purpose or cause, to haul and transport all of the property that second party desires to transport, first parties agree to immediately deliver to second party, other or additional trucks and trailers, sufficient for the needs of second party, all of which shall be deemed to be and shall be leased and held and used by second party pursuant to the provisions of this agreement.

8. Second party agrees to pay first parties, weekly, the reasonable value of the use of the leased property, together

[fol. 26] with all services rendered by first parties. Such reasonable value shall be based upon and determined by the nature and weight of the property transported on said leased property, and the distance transported, and shall not be greater than the customary charge for similar services in the neighborhood.

9. Upon the termination of the term, or sooner determination thereof, second party agrees to return all of said leased property to first parties, damage by fire, elements or other cause excepted. There shall be no liability on the part of second party for depreciation or damage to said leased property from use, operation or other cause.

10. Second party may, at any time, terminate this lease, and thereupon all liability hereunder shall fully terminate and end, save and except that second party shall pay first parties all rental that may have accrued to first parties up to the time of such termination.

In witness whereof, the parties have caused the execution of this agreement, in duplicate, the day and year first above written.

Frost and Frost Trucking Company, by —— ——.
Redlands Orange Growers Association, by —— ——.

[fol. 27] EXHIBIT "E" TO PETITION

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Case No. 1976

Application for Rehearing

Come now the defendants, Marion L. Frost and Wesley H. Frost, doing business under the name of Frost and Frost Trucking Company, and without waiving their objections that the Honorable Commission is without jurisdiction in the premises, and without submitting to the jurisdiction of the Commission except for the limited purpose of filing this instrument, herein denominated an application for rehearing, and without waiving any of the objections

made by them heretofore in the above entitled proceeding, respectfully make application for a rehearing in the above entitled matter, and respectfully represent and urge as grounds for such rehearing, as follows, to-wit:

That in entertaining, and hearing the complaint filed in the above entitled matter, and in making its decision, numbered 13945, dated August 20th, 1924, said Commission acted without and in excess of its jurisdiction, and in violation of law, and contrary to law, for the following reasons:

I. Assuming the Act of the Legislature, approved May 10th, 1917 (Chap. 213, Stats. 1917) and amendments thereto (said Act being hereinafter referred to as the "Transpor-[fol. 28] tation Act") is valid and constitutional, no authority is conferred by the Constitution or the laws of the nature of the complaint filed in the above entitled proceeding, as the jurisdiction of the Commission is limited to entertaining complaints relating to the service of a public utility and those matters as to which jurisdiction is expressly conferred, and in entertaining such valid complaints, the Commission may decide matters incidental to its jurisdiction, and determine whether or not it has jurisdiction, but said Commission is not given authority to entertain a complaint merely for the purpose of determining whether a person or corporation is a public utility or is a transportation company, and said Commission is without jurisdiction to make an order of the character made in the above entitled proceeding, wherein it is merely purported to be determined that certain persons are a transportation company, and then such persons are ordered to desist from being such transportation company.

II. The Transportation Act, in so far at it purports to confer jurisdiction upon the Railroad Commission to regulate a private business and the performance of a private contract of the nature which the evidence shows these defendants were conducting and performing, is in conflict with the Constitution of the United States, and is void.

III. Assuming the power in the Legislature to regulate the use of the public highways, the Transportation Act is unconstitutional and void as in violation of the Due Process Clause of the Constitution of the United States in not

providing any standard for the issuance of the certificate of public convenience and necessity therein provided for.

IV. No authority is conferred upon the Railroad Commission by the Constitution of California to regulate a purely private business and the performance of a purely private contract.

V. Said Transportation Act is unconstitutional and void [fol. 29] in so far as it purports to regulate a private business and the performance of a private contract, in that it would result in a taking of property for public use without due compensation being first made.

VI. The evidence is wholly insufficient to warrant any finding that these defendants are engaged in operating a transportation company, or that these defendants are a transportation company, as defined by the Transportation Act, assuming its validity, for the reason that the evidence affirmatively shows that the trucks of these defendants are leased to another, for use solely in its business, and that the operation of the trucks owned by these defendants over the public highways is not in legal effect, the operation by these defendants, but rather, the operation by Redlands Orange Growers Association. That in ignoring the lease involved in the proceeding, and its effect, the Commission has ignored the well established principle of law, that where the same results might be obtained, in effect, by different methods, one falling without the inhibition, the Courts will not hold the method employed to fall within the inhibition because the method employed obtains results the same as those that would be obtained by employing the inhibited method; or, in other words, an act is not unlawful unless it clearly falls without the inhibition itself.

Wherefore these defendants pray that the Honorable Commission grant a rehearing in the above entitled proceeding, and that upon such rehearing, said order may be abrogated and rescinded September 6th, 1924.

Respectfully submitted, Marion L. Frost and Wesley H. Frost, Doing Business under the Name of [fol. 30] Frost & Frost Trucking Company, by —— ——, Defendants. Leonard, Surr & Hellyer, San Bernardino, California, Attorneys for Defendants.

[fol. 31] EXHIBIT "F" TO PETITION

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Case No. 1976

Order Granting Rehearing

By the COMMISSION:

Petition for rehearing having been filed in the above entitled matter by defendants, Marion L. Frost and Wesley H. Frost, doing business in the name of Frost & Frost Trucking Company, and good cause therefor appearing,

It is hereby ordered that said petition for rehearing be, and the same is hereby granted.

And it is hereby further ordered that said rehearing be had before Commissioner Shore, in the Court Room of the Commission, 810 Pacific Finance Building, Los Angeles, California, on Wednesday, the first day of October, 1924, at 2 p. m.

Dated at San Francisco, California, this 13th day of September, 1924.

C. L. Seavey, H. W. Brundige, Edgerton Shore, J. T. Whittlesey, Commissioners.

[fol. 32] EXHIBIT "G" TO PETITION

ELH

Decision No. 14257

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Case No. 1976

Order Affirming Prior Order

By the COMMISSION:

Rehearing having been had in the above-entitled matter the case being submitted, and no good cause having been made to appear why our former order herein (Decision No. 13,945) should not be affirmed,

It is hereby ordered that our said Decision No. 13,945 made herein on the 20th day of August, 1924, be, and the same is hereby affirmed.

Dated at San Francisco, California, this 12th day of November, 1924.

C. L. Seavey, Irving Martin, Egerton Shore, Commissioners.

[fol. 33] [Title omitted]

POINTS AND AUTHORITIES

Preliminary Statement

Petitioners were not, in any event, operating as a common carrier, or in serving the public. The only evidence adduced at the hearing disclosed that petitioners' trucks were used in moving the property of Redlands Orange Growers Association. No claim was made at the hearing or elsewhere that petitioners were operating as a common carrier, or that their trucks were used for any purpose other than as aforesaid.

The Railroad Commission claims that under the language of the Auto Stage and Truck Transportation Act (Chap. 310, Stats. 1923) its jurisdiction extends equally to one engaged in performing a private contract, as to those engaged in hauling for the public at large, or as common carriers. Thus, it asserts jurisdiction in the case where one is merely hauling property for another, under a private contract, if such hauling takes him back and forth over the same route, and claims such hauling may not be done until the person obtains a certificate declaring that "public convenience and necessity require such operation." One of the learned attorneys for the Commission admitted that, as the Act was construed by the Commission, a student attending school, and motoring from his home to the school and back on school days, would come within the inhibition of the Act if he should transport a school mate to and from school, for which some payment was received, for such act [fol. 34] would constitute the operation of an auto for compensation over the public highway between fixed termini. It is this construction and application of the Auto Stage and

Truck Transportation Act with which we are concerned in this proceeding.

Point I. No jurisdiction or authority is conferred by the Constitution of the State of California upon the Railroad Commission to supervise or regulate a private act of the nature involved in this proceeding.

The Constitution of California confers powers upon the Railroad Commission solely with respect to public utilities. In Section 23 of Article XII of the Constitution, certain persons or corporations performing certain acts "to or for the public" are declared public utilities, and subject to control and regulation by the Commission. Then it is provided:

"The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution."

In Section 22 of said Article XII, it is provided:

"Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies."

The foregoing quotation merely provides for the establishment of "rates of charges," by railroads and "other transportation companies." Under familiar rules of law the expression "other transportation companies" will be held to mean those companies that perform a service similar to that performed by railroads, namely, the hauling of passengers and freight for the public. The context of the entire section permits of no doubt upon this point.

In said Section 22, it is further provided:

"No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the [fol. 35] same kind or different from those conferred here-

in which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.

The provision last quoted appears in said Section 22, which theretofore has expressly conferred upon the Commission, certain express powers with reference to railroads and "other transportation companies." It is submitted that while additional "powers" may be conferred upon the Commission those are powers with respect to railroads and "other transportation companies," or in any event, they are powers with respect to the public utilities with which the next succeeding section of the Constitution deals.

It will never do to say that "powers" referred to are not restricted to powers respecting railroads or other public utilities for if they are not so restricted, our Constitution has been swept into the discard, and the legislature might confer upon the commission powers with respect to any and everything. Thus, all of the powers which are now vested in the courts might, by legislature first, be vested in the Commission. If these be "powers" of any and every nature, then the legislature can vest in the Commission the power to veto and approve bills, which power is now vested in the governor; the power to control the schools; the power even to legislate; and every power, which, by the Constitution is now vested in some person or other commission, might, by the legislature, be conferred upon the Railroad Commission, if there is no restriction upon the right of the legislature as to the subjects it can commit to the jurisdiction of the Railroad Commission. What we mean to say is, that where the legislature is authorized to confer upon the Commission additional or different "powers," those powers are such as relate to the regulation and control of railroads and other transportation companies, or, in any event, to public utilities.

The foregoing is in accord with the conclusions of this [fol. 36] Court as announced in Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, where, in the summary of the conclusions, as stated by Mr. Justice Henshaw, it is said:

"2. The Constitution has authorized the Legislature to confer additional and different powers upon the Commission touching Public utilities unrestrained by other constitutional provisions."

And in the summary of the conclusions, as stated by Mr. Justice Sloss, in that case, it is said:

"3. If the Railroad Commission has acted in conformity with the powers granted to it by the Legislature, the validity of its order cannot be questioned in this court or elsewhere under a claim of violation of any provision of the state Constitution other than the provisions relating to the Railroad Commission. This statement is, however, to be taken subject to the qualification that the powers conferred by the legislature on the Railroad Commission must be such as are cognate and germane to the purposes for which the Railroad Commission was created; i. e., the regulation and control of public utilities.

Views in strict accord with what has hereinbefore been said are found in City of Pasadena v. Railroad Commission, 183 Cal. 526, where it was said:

"If the provison of section 22 that 'the authority of the legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred' upon the commission by the constitution, should be thenceforth 'plenary and unlimited by any provision of this constitution' is to be taken literally, its possible results would be so startling that it cannot be conceived that any citizen could ever be induced knowingly to vote for such a measure. If so construed, the legislature would thereby be -powered to confer upon the Railroad Commission all the powers of government, executive, judicial, and even the legislature power itself. Of course, no such effect can be allowed to this broad declaration. It must be construed in connection with the general subject of the section, with the other sections which precede it relating to the same general subject, and with the place in which it occurs in the constitution. * * * Considering all these circumstances, the only reasonable conclusion is that the authority intended to be given to the legislature by this section to confer powers upon the Railroad Commission must be limited

to the subject of powers over common carriers and transportation, and the control and regulation thereof by the commission, and such other things as may be necessary or convenient for the proper and effectual exercise of such powers of regulation and control. The subject of similar powers over all other classes of public utilities carried on by private corporations or persons is covered by the provisions of section 23, as we have seen."

It therefore appears beyond possibility of argument, that in so far as the constitution has conferred any authority upon the Railroad Commission, or authorized the legis- [fol. 37] lature to confer authority, such authority is limited and restricted to the regulation and control of common carriers and other public utilities. It cannot be said that the Constitution has authorized the legislature to confer authority upon the Commission to regulate the practice of law and medicine, or the price for which flour, coal, bread or milk shall be sold, or the performance of a contract for hauling the property of another, whether by airplane, by auto, or by any other agency, when the person doing the hauling does not intend to, and is not hauling for or serving the public at large, or a limited number thereof, so as to make him a common carrier.

If the Auto Stage and Truck Transportation Act, by proper construction may be said to apply to one engaged in the performance of a private undertaking, as distinguished from one serving the public so as to confer any authority or jurisdiction upon the Railroad Commission with respect thereto, the basic authority for such jurisdiction comes not from the constitution, but solely emanates from the legislature, and the situation is no different than had the legislature prescribed that no person should engage in such private contract, unless and until he had secured from the Board of Medical Examiners a certificate declaring that public convenience and necessity required the performance of the contract or the act.

Point II. Property construed, the Auto State and Truck Transportation Act does not apply to the performance of a private contract of the nature petitioners were engaged in.

The Auto Stage and Truck Transportation Act was adopted in 1917 (Stats. 1917, page 330). It defined a "Transportation Company" as anyone "owning, controlling, operating or managing any automobile, jitney bus, auto truck, stage or auto stage used in the business transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route," with certain exceptions, not here relevant. It clearly applied solely to common carriers. It inhibited any transportation company [fol. 38] from carrying on its operations unless and until it first secured a permit from the governing body of each city through which the company intended to operate. The Railroad Commission was declared to be vested with jurisdiction to regulate every such company, to fix fares, and in general to supervise it. It was further provided that each company should secure a permit from the Commission declaring that public convenience and necessity required the operation.

The Act was changed and amended in numerous particulars in 1919 (Stats. 1919, p. 457). The title was amended, and all of Section 3 of the Act, containing elaborate provisions for securing a permit from the governing body of each city through which the operations were to be conducted, was repealed.

Section 1 of the Act, which contains the definition of a transportation company, was amended in several particulars, including the definition of such transportation company. As amended a transportation company was defined as anyone "owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regulate route," with certain exceptions, not here relevant.

In short, this amendment in the definition of a transportation company, consisted in inserting the words we have underscored, namely, "in the business" and "or."

It was this amendment, evidently that has caused the Railroad Commission to assert that it is given jurisdiction over every operation whatsoever on the public highways,

both as to common carriers, and in those instances where one used a truck in hauling the property of another, when such hauling required recurring trips over the same highway or between the same places.

[fol. 39] It may be admitted that the words of the Act are susceptible of two constructions, one in harmony with the construction of the Commission, but at the same time, considering the Act as a whole, with all of the surrounding circumstances, it is submitted the construction adopted by the Commission is not correct, and the Act does not purport to vest jurisdiction in the Commission to regulate, and equally to deny and prevent the performance of a contract between two persons, in which the public is not concerned.

First. The jurisdiction of the Commission, as conferred by the Constitution, pertains solely to the regulation of public utilities, and if the legislature has desired to extend the purpose for which the Commission exists, and to confer jurisdiction upon the Commission to prohibit and regulate a private act, such intent should have been expressed in language so clear as to permit of no doubt.

Secondly. The Act contains penal provisions. If the Commission be correct in the case involving these petitioners, they are subject to fine not exceeding $1,000 and imprisonment not exceeding one year. No law, susceptible of two constructions, will be construed to include acts, which, under another equally permissible construction, are not within its provisions.

Thirdly. Construed as a whole, the Act clearly shows its provisions apply to a service rendered or to be rendered to the public.

(a) In subdivision "c" of Section 1, wherein is set forth a definition of the term "transportation Company," it is provided that the term "transportation company" does not include "any other carrier which does not come within the term, 'transportation company' as herein defined."

The component things to constitute a transportation company under the definition are: a transportation of persons [fol. 40] or property a compensation for the same, the operation over the public highways, and the fixed termini

or regular route. Unless these things be present in any instance, there could under no circumstances, be a transportation company. The exception above noted expressly recognized there may be a "carrier," who does not fall within the term. If any meaning or effect whatsoever is to be given to the exception, we have a distinct recognition of the fact there may be, in a given case, these same elements present, namely, an operation of trucks over the public highways, a transportation of persons, or property, a compensation for the same, and the fixed termini or regulate route, and still, all of these elements do not make a "transportation company." If such be not the case, then what is the meaning of "any other carrier," as used in the exception to the definition. It will not suffice to say it applies to railroads or electric roads, because they never came within the definition of a transportation company in the first instance. It will not do to say it applies to air plane transportation, because such does not fall in any event within the meaning of the words used in the definition. It cannot be said to apply to a taxicab company, because such is expressly excluded in the definition. It cannot be said to pertain to an operation of a jitney bus or truck line solely within the corporate limits of a city, because such does not come within the definition employed as the given definition expressly excludes them.

We repeat, no purpose, use, significance or meaning whatsoever, of any kind, can be given to the exception "any other carrier," unless it be an admission and recognition of the fact there are operations of trucks, over the public highways, between fixed points or over a regular route, for the transportation of persons or property for compensation, and still such operations do not make the owner or operator a "transportation company" within the meaning [fol. 41] of the Act.

It is recognized, in law, that there are two classes of "carriers." At 10, C. J. 37, it is said:

"A carrier is one that undertakes the transportation of persons or movable property, and the authorities, both elementary and judicial, recognize two kinds of classes of carriers, namely, private carriers and common carriers. A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver

goods in a particular case for hire or reward. While a common carrier has been defined as one that holds itself out to the public to carry persons or freight for hire, the term did not, at the common law, embrace a carrier of passengers, and is commonly confined to carriers of goods, as distinguished from common carriers of passengers."

And at 10 C. J., 38, it is written:

"A private carrier is one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods in a particular case for hire or reward. He may carry or not, as he deems best. He is but a private individual and is invested, like all other private persons, with a right to make his own contracts."

(b) In Section 4 of the Act under discussion, it is provided:

"The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation company in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts, service, and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public."

The foregoing quoted provisions are pertinent enough when applied to concerns dealing with and serving the public, but it is indeed impossible to find any provisions in the foregoing that properly apply to a private contract, such as is involved in this case. It is to be noted there is a distinct recognition in the foregoing quoted provisions that the regulation is of matters "affecting the relationship between such companies and the traveling and shipping public." This is a distinct recognition of the fact that transportation companies are those who are dealing with the public, and of course, serving the public.
[fol. 42] In said section 4, it is further provided:

"The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, etc."

Here is a distinct recognition of the fact that the legislature deems the authority to be exercised by the Commission under this Act is that which has been conferred upon it by the constitution of the state, and as hereinbefore pointed out, that authority conferred by the constitution is limited to regulating public utilities.

(c) Then in section 5 of said act, it is provided that no transportation company shall begin its operations "without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation."

It is unthinkable that the legislature intended to prescribe as the criterion for performing a private contract, that public convenience and necessity required the doing of the act.

No measure or basis is fixed by the Act under which the Commission is directed to give its permit, and the Commission is authorized to issue its certificate, or "to refuse to issue the same" as "in its judgment, the public convenience and necessity may require."

It is again unthinkable that the legislature intended to deprive the citizens of the State of their right to use the highways in the performance of a private contract, in which the public, as such, has no direct or indirect interest, merely at the whim of a Commission, who could arbitrarily refuse the needed permission. If it be thought that "public convenience and necessity" be the criterion upon which the permit is to issue or be refused, it is impossible to see how [fol. 43] any permit could ever be procured in such cases, for no person desiring to perform a private contract, which involved the use of the roads, could show that "public convenience and necessity" required the performing of such contract. Could it be possible that the legislature intended to prevent the performance of all such private contracts? Can it be possible the legislature intended that an orange packing house having cull oranges to be hauled away daily and dumped in the river bottom might not contract with

one to haul them away by auto truck unless public convenience and necessity so required?

In section 6 of the Act, are found limitations similar to those in the Public Utilities Act, regarding incurring indebtedness and requiring consent to be obtained from the Commission. Then, in Section 6a, a transportation company is required to furnish reports as the Commission requires. In Section 6b, there is an inhibition against giving passes, or free or reduced transportation. By Section 7, an attempt is made to extend the provisions of the public-utilities act to the hearing of complaints, holding hearings, making orders and in general the adoption of the practice prescribed in the public utilities act.

(d) Summarized, the Auto Stage & Truck Transportation Act, in every provision, discloses an attempt to regulate a service to the public by motor vehicles, exactly as railroads and other public utilities are regulated. Thus far, it is in keeping and harmony with the functions and duties of the Railroad Commission, and the jurisdiction conferred by the Constitution. There is not a word or provision in or about the Act reasonably applicable to an extension of its provisions to the performance of a private contract by one who does not intend or desire to engage in a public service; nor is there anything in or about the Act to indicate that the legislature desired or intended to do other than cause the regulation of motor vehicles engaged in public service.

[fol. 44] It might also be noted, in passing, that if this Act does apply to private contracts, such as petitioners were engaged in performing, the following startling results obtain: The contract may not be performed unless and until the Commission sees fit to issue a certificate declaring that public convenience and necessity so require; then, the person securing such certificate having submitted to the jurisdiction of the Commission, is subject to complete regulation of the Commission, who may fix the compensation received by him, and regulate his operations, and, of course, require him to perform the same or similar services for the public, thereby affixing to his property a public interest.

(e) It appearing clearly that the legislature intended to regulate a public service by the Act, the definition of "transportation companies" as used in the Act, should be

construed to apply to those engaged in serving the public. The expression "as a common carrier" in the Act, preceded by the conjunction "or," should be construed as having the same meaning as the remainder of the definition. In Arthur v. Cumming, 91 U. S. 362, 23 L. Ed. 438, the court had under consideration a statute imposing a duty "on all oil-cloth foundations or floor-cloth canvas made of flax." Commenting on the use of the conjunction "or," the court said:

"The researches of the counsel for the defendant in error have brought to our attention many instances in which two phrases with the like conjunction between them have been used to designate the same thing. In those cases it was obviously done to make clear and certain the meaning of the legislature, and to leave no room for doubt upon the subject. Such in this section seems to be the purpose of Congress. The phrase 'oil-cloth foundations' would not necessarily import the article known in commerce as floor-cloth canvas; nor would the phrase 'floor-cloth canvas' necessarily import an article to be used for 'oil-cloth foundations.'

Considering the juxtaposition and connection in which the two phrases are found, and letting in upon them the light of the mercantile evidence, the inference is clear that Congress used them and intended that they should be understood as convertible terms."

[fol. 45] Now in the Act under discussion, when we let in the light emanating from all of its provisions, and find that its provisions relate and must necessarily relate to the regulation of common carriers, the inference is clear that the Legislature intended the expression "as a common carrier" to be a convertible term for the other expression used. It seems reasonably clear that after attempting to define a transportation company as one operating an auto truck used "in the business of transportation of persons or property," in order to make absolutely clear the limitations it had in mind, it inserted the expression "or as a common carrier" as synonymous with the other expression used. If such were not its purpose, why was it inserted at all? If the first part of the definition, preceding "or as a common carrier" is to be construed literally, it includes every operation, whether of a private nature or those of a public

character. If that is to be construed literally, why again repeat something which forms only a part of the whole already defined? If the first part of the definition is literally construed, as the Railroad Commission contends, then the expression "or as a common carrier" should have been entirely omitted, as it adds nothing. It is certainly unusual, and opposed to the ordinary use of language, to define an act, which, according to the contentions, includes operations of a private as well as a public character, and then repeat the definition for one of them. It is more reasonable to suppose that had the legislature intended such a startling change, and intended to extend jurisdiction to an entirely new field, it would, ex industria, have defined the new field for the second time, to make its intention clear, rather than to have again defined the old field, which it was well apparent the Act did cover, and from its first had covered.

It would be in keeping with the decisions in order that the Act be harmonious in all its provisions, to construe the "or" in the definition as meaning "and" making it ap- [fol. 46] ply to an auto truck "used in the business of transportation of persons or property and as a common carrier for compensation."

Thus, it was held in McConkey v. Superior Court, 56 Cal. 83, in the language of the syllabus:

"The word 'or' in section 978 of the Civil Code of Procedure joining the clauses referring respectively to the undertaking for costs on appeal and an undertaking for a stay of proceedings, is to be read 'and,' and in all cases the former undertaking is essential."

The conclusion stated in that case was arrived at by considering all of the provisions of the section. (For numerous cases, covering several pages, where "or" was construed as "and," see Words and Phrases, Vol. VI. p. 5002, under topic Or.)

Our conclusion is, that while the definition in the Act under discussion, read alone, is susceptible of being construed in accordance with the contentions of the Commission (altho equally susceptible of the opposite construction), when the entire Act is considered, all uncertainty is resolved, and the expression "transportation company" as used in the Act is clearly restricted to common carriers, or, in any event, to an hitherto undefined class of carriers, per-

forming a service differing materially from the use of trucks solely in carrying property of one person, as was the case here.

Point III. Assuming the Transportation Act does pertain to private acts and business as well as those affected by a public interest & there is no jurisdiction or authority in the commission to entertian a complaint or make an order of the nature here made with respect solely to a private act and business.

Holabird v. Railroad Commission, 171 Cal. 691, involved a case where there were two common carriers, each of whom had a certificate of public convenience from the Commission, authorizing certain acts. One made complaint that the other was violating its permit to the injury of the complaining carrier. The Commission entertained the complaint, and after hearing, ordered the offending carrier to [fol. 47] desist. The Supreme Court held the injunctive order proper. There, however, express authority was conferred by Section 22 of Article XII of the Constitution to supervise and regulate such common carrier.

As hereinbefore pointed out, and as squarely held in City of Pasadena v. Railroad Commission, supra, the constitutional provisions pertain solely to common carriers and other public utilities, and the situation here with respect to a private business is the same as though the legislature had created a commission, without constitutional authorization, and attempted to vest in it the same powers that the Commission had with respect to a business charged with a public interest.

The only authorization for entertaining proceedings of the nature here involved is found in Section 7 of the Transportation Act, providing:

"In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the Railroad Commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court,

in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act."

The Commission has no power or authority over a private business under the Constitution, so the sole "power and authority" of the Commission, if any, with respect to a private business, is found solely in the Transportation Act. However, under the provisions of said section, all of the proceedings which may be taken before the Commission are expressly declared to be "under the conditions, and subject to the limitations and with the effect specified in the public utilities act."

It is a condition and limitation under the public utilities act (sec. 60) that the complaints filed shall be with reference to "any act or thing done or omitted to be done by any [fol. 48] public utility, including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation of any provision of law or of any order or rule of the commission."

In other words, the conditions and limitations under the public utilities act restrict proceedings to those pertaining to or affecting public utilities, and hence, under the Transportation Act, the limitations upon the authority and power of the Commission confine its jurisdiction to public utilities, and it has no power to entertain any complaint, or hold any hearing, or give its decision and order except as to public utilities, or more particularly, to common carriers by motor vehicles.

[fol. 49] Point IV. If the Transportation Act, properly construed, shall be held by its terms to apply to private business, then to such extent it is unconstitutional, as the Legislature cannot create a judicial body with the powers of the Railroad Commission without constitutional authority.

The Transportation Act is designed to regulate business. In the definition of a transportation company, it is provided that the motor vehicles shall be those "used in the business of transportation of persons or property."

In Section 22 of Article XII of the Constitution, the Railroad Commission is given jurisdiction over "railroads and other transportation companies."

The legislature cannot, merely by its fiat, bring a private business within the meaning of "other transportation companies" or extend, in any manner, the meaning of the expression (Carstens v Pillsbury, 172 Cal. 572, 158 Pac. 218; Pacific Gas & Electric Co. v. Industrial Accident Commission, 180 Cal. 497, 181 Pac. 788; Employers' Liability, Etc., v. Industrial Accident Commission, 187 Cal. 615, 203 Pac. 95).

If it be contended or said that the Transportation Act purports (without constitutional authority) to extend the jurisdiction of the Railroad Commission to the regulation of a private business, and that the provisions of the public utilities Act and the transportation act are made or are applicable to a private business, then is the Transportation Act unconstitutional to such extent, for the Railroad Commission is a judicial body (Pacific Telephone Etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119), and the legislature cannot, without constitutional authority, create a judicial body of the nature and powers of the Railroad Commission (Carstens v. Pillsbury, supra; Pacific Gas etc., Co. v. Ind. Accident Commission, supra; Employers' Liability etc. v. Ind. Accident Commission, supra; concurring opinion of Shaw, Tulare Water Co. v. State Water Commission, 187 Cal. 533, 542).

[fol. 50] Point V. If the Transportation Act, properly construed, be held to apply to a private business of the nature in which petitioners were engaged, then to such extent it is in conflict with the Constitution of the United States.

As hereinbefore shown, the Transportation Act attempts to regulate transportation companies, a transportation company being defined as anyone "owning, controlling, operating or managing" any motor vehicle "used in the business of transportation of persons or property, etc." Hence the Act is an attempt to regulate business.

The extent that a private business may be regulated by a State or a Commission of a State, is fully discussed and the cases catalogued in the two most recent decisions of the Supreme Court of the United States, bearing exhaustively upon the question, namely:

Adkins v. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785; 24 A. L. R. 1238. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522; 67 L. Ed. 1103; 27 A. L. R. 1280.

The Adkins case involved the minimum wage law of the District of Columbia. The law, in attempting to fix a minimum wage that should be paid women, was held unconstitutional, as in violation of the right of a person to contract about his own affairs. There is a full discussion showing what businesses are charged with a public interest, so as to be susceptible to regulation, and the extent such regulation is permitted. The power to regulate the right of women to contract to work, and of others to employ them, for such wages as might be agreed upon, was denied. The Court denied that the employment of women was so clothed with a public interest as to permit regulation by the public. Among other things, the court there said:

"Should a statute undertake to vest in a commission power to determine the quantity of food necessary for in-[fol. 51] dividual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test."

Likewise, in the Wolff Packing Company case, there is a classification of businesses so clothed with public interest as to justify public regulation, and the extent of such regulation. In the syllabus to that case it is written:

"One does not devote his property or business to public use or clothe it with a public interest so as to subject it to public regulation of prices and wages merely because he makes commodities for and sells to the public in such callings as that of butcher, baker, tailor or miner, and the mere legislative declaration that he does so is not so persuasive with the court that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise."

There Chief Justice Taft, said:

"It has never been supposed, since the adoption of the constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the miner was clothed with such a public interest that the price

of his product or his wages could be fixed by state regulation."

The historic line between a public business and a private business still remains. The Supreme Court of the United States will not permit the rates or prices to be charged in a private business to be regulated by a State or any commission.

The line of demarcation is clearly defined between the common carrier on the one side, serving the public, whose rates may be regulated by the State on account of the public interest, and the person on the other side who engages purely in the performance of a private contract that involves hauling over the public highways. If the Transportation Act under discussion be valid, then it permits the fixation of rates to be charged in a purely private business, whereas, the Supreme Court of the United States denies the right of a State to interfere with the right of private contract, or to regulate the prices to be charged in connection with a private business not affected with public interest.

Can the mere fact that a person, in performing and carrying on a private business, makes use of the public high- [fol. 52] ways, cause that attaching to that business of a public interest, so as to permit the State to regulate and determine what he shall charge in that business? If it be so held, then, truly has a mean[d] been found to regulate every private business in the State, almost without exception, for what private business is there but is dependent upon the use of the public highways?

"A public road is a way open to all the people, without distinction, for passage and re-passage at their pleasure."
Sumner Co. v. Interurban Transportation Co. (Tenn.), 213, S. W., 412; 5 A. L. R., 765.

It would be a dangerous principle to hold that solely because a business lawful of itself makes use of the public highways, the right to conduct that business could be denied and prevented at pleasure, and if permitted, the prices or rates charged therein could be determined by the State, and even the nature of the business materially changed, so as to be required to serve all at the pleasure of the State. Would it not follow that the Legislature could regulate the price

to be charged for delivered milk, because of the fact that the public highways were used in the delivery thereof and the prices charged included the hauling thereof

"A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."

Adkins v. Children's Hospital, supra.

The public interest in the highways is confined to measures for safety thereon, and the construction and upkeep thereof, and in no manner does this Act regulate or purport to regulate or control such use, construction and upkeep.

[fol. 53] Point VI. Assuming the Transportation Act, properly construed, by its terms applies to a private business of the nature petitioners were engaged in, to such extent it is violative of the Constitution of the United States and also of the State of California, as it would result in the taking of private property for public use without compensation.

If the Transportation Act applies to him, one performing a private contract, becomes by reason of his operations, a transportation Company and subject to the jurisdiction of the Railroad Commission, and subject to all of the provisions of the Act, with the fixation of his rates and the supervision of his business, including the requirement that he serve all who apply. Thus, one in performing a private contract, attaches to his business and property, if the Act be valid, a public interest, or, in other words, he is compelled to dedicate his property to public use, regardless of his wishes.

Said the Supreme Court of the United States in Producers Transportation Co. v. Railroad Commission, 251 U. S., 228; 64 L. ed. 239:

"The state could not by more legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the 14th amendment."

[fol. 54] Point VII. Assuming the power to regulate the use of the public highways and assume the Transportation Act by its terms applies to one engaged in a private business or in performing a private contract, then to the extent that it applies to such private business it is in violation of the due-process clause in not providing any standard for the issuance of the certificate of public convenience and necessity.

As hereinbefore pointed out, no standard or measure is established by the Act for the guidance of the Commission, but the Commission is permitted to arbitrarily issue or refuse to issue the certificate of public convenience and necessity.

It is elemental that there is an inherent right in all persons to use the public highways, and whatever regulations are made respecting such use must operate impartially upon all persons in the same class.

In Yick Wo v. Hopkins, 118 U. S., 356; 30 L. ed. 220, an ordinance of the City and County of San Francisco prohibiting the conduct of a laundry in wooden buildings, except on consent of the Supervisors, which consent might be and was arbitrarily given and refused, was held void.

In Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9; 51 N. E., 758, 42 L. R. A. 696, an ordinance prohibiting the use of certain streets to all except private wagons carrying families, or "upon special permission of this board," was held void in not containing provisions which would operate generally and impartially upon all.

The syllabus to In re Dart, 172 Cal. 47, reads:

"A municipal ordinance to the extent that it gives a commission established by the municipality the absolute and arbitrary power to forbid any person from soliciting for private charity, regardless of his personal character, worth or fitness, or from selling goods donated to such charity, is unconstitutional and void."

There it was said, citing numerous authorities:

[fol. 55] "The power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress."

See further, the concurring opinion of Justice Shaw in the Dart case, where, speaking of the arbitrary power attempted to be lodged in the commission to grant or refuse the permit, he said:

"To the extent that they give this arbitrary power they are contrary to the constitution and void. They come within the principles stated by the Supreme Court of the United States in Yick Wo v. Hopkins, 118 U. S., 356, and by this court in (citing four California cases)."

See cases cites by Justice Shaw in Dart case; also in re Peppers, 189 Cal. 682:

"A highway in a way open to the public at large without distinction, discrimination or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand, and the duty of public maintenance on the other."

Vol. 13, Ruling Case Law, p. 14.

The act not only restricts the person who desires to operate his trucks in the performance of a private contract, but takes away from the person desiring transportation the inalienable right to contract for the transportation of his property regardless of whether he might have it transported by a common carrier.

[fol. 56] Point VIII. In any event, and regardless of the validity of the Transportation Act and its application to a private business, petitioners do not come within the provisions of the act, as the operations in which the trucks were used were those of Redlands Orange Growers Association.

The learned Railroad Commission, ever zealous in seeking to extend its authority, in commenting upon the agreement between Petitioners and Redlands Orange Growers Association, dated December 14th, 1923, under which it was admitted petitioners' truck- operated, saw fit to ignore and discard every salient provision of that agreement that determined its true nature, and held it was a contract for transportation.

The agreement in question shows that the Association has transportation of four different kinds that it requires in its business, one of which was transporting its packed fruits from Redlands to the wharves.

The words of the agreement were that four trucks with their trailers were leased, to the Association, for a specified period, and that the Association "shall be entitled to the sole and exclusive possession and use of said leased property," and that "said leased property shall be used for no other purpose, and that if said trucks, or any of them, are at any time in the physical custody of first parties (petitioners), for purposes of operation, storage or repairs, or any other purpose, the legal use and possession of said property is solely in second party (the Association), and first parties shall not in any manner use or employ said leased property for any business conducted by them, or in transporting the property of others."

The agreement expressly recognizes and states that the Association "will be liable, in the event of negligence in the operation of said trucks, regardless of by whom actually driven, for injury to the person or property of others."

[fol. 57] The only evidence before the Commission was that the trucks of petitioners were used under and pursuant to the provisions of that agreement, and the Commission might not, in any manner, disregard one word or clause of the agreement, or hold that it mean other than what it said.

Undoubtedly the legal effect of that agreement gave the legal possession of the trucks to the Association, and in law, the Association operated the trucks, and became and was liable to all persons as the operator of the trucks. The only evidence being that the trucks were used under and pursuant to that agreement, there is no evidence to warrant any finding that the trucks were operated by petitioners.

The learned Commission seemed impressed by the fact there was no specific rental provided to be paid, the Association agreeing to pay "the reasonable value of the use of the leased property together with all services rendered by first parties." In view of the fact that the trucks were to be used in diverse operations such as the transporting of citrus fruits from the ranches where grown to the packing house of the Association, and transporting of fertilizers

and other farming supplies to the ranches of the members, how could there well be? The proper rental for the use of the trucks manifestly depended upon the load and the distance which was constantly changing, except the distance remained constant, in the transportation from the packing house to the wharf, which item alone the Commission seems to have had in mind.

We do not deem that when one owns a truck and leases it to another, who uses it in tra-porting his own property, that the leasing owner thereby becomes a transportation company. It is true that the leasing owner is one "owning" a truck, "used in the business of transportation of property" in a limited sense, but the lessee, in transporting his [fol. 58] own property, is not engaged "in the business of transportation of property for compensation." The compensation referred to is compensation paid to one for the transportation of the property of another.

Because similar ultimate results might have been obtained in effect, by the Association contracting with petitioners to haul the property of the Association, does not change the legal effect of this agreement and make the operation of the trucks that of petitioners rather than that of the Association. It is of course elementary that where the same ultimate results may be attained in two different methods, one of which does come within the inhibitions of a statute making it unlawful, and the other does not, a person cannot be convicted of violating the statute with inhibitions when he has pursued a course which does not come within the inhibitions.

In conclusion, and in fairness to the Honorable Commission it is perhaps just to state, on the authority of the learned attorney for the Commission, that the Commission believes, while the points herein made are "oper to argument," it is the duty of the Commission, in any case, to construe the law literally, and permit the Courts to pass upon all questions of constitutionality and construction.

It might further be stated we are in receipt of a communication from Messrs. Thelen & Marrin, Attorneys at Law, Balfour Building, San Francisco, advising they are interested in a matter similar to the one here involved, and they will probably request permission to file an amicus

curiæ petition in the Supreme Court supporting our position.

Respectfully submitted, Leonard, Surr & Hellyer, Attorneys for Petitioners.

[fol. 59] Receipt of a copy of the within Petition is hereby acknowledged this 12th day of December, 1924.

Railroad Commission of the State of California, by Carl I. Wheat, Attorney, by C. R. Williams, Respondent.

Receipt of a copy of the within Petition is hereby acknowledged this 12th day of December, 1924.

Richard T. Eddy, Attorney for Respondent A. J. Happe.

IN SUPREME COURT OF CALIFORNIA

In Bank

ORDER TO SHOW CAUSE

By the COURT:

Respondents ordered to show cause before this Court, in bank, at its courtroom, in Los Angeles, on Monday, January 26, 1925, at two o'clock P. M., why Writ of Review should not issue as prayed for herein.

Dated December 23, 1924.

Myers, C. J.

[File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

DEMURRER TO PETITION FOR WRIT OF REVIEW AND POINTS AND AUTHORITIES OF RESPONDENT RAILROAD COMMISSION OF THE STATE OF CALIFORNIA—Filed January 27, 1925

Comes now the respondent, Railroad Commission of the State of California, and in response to the order to show cause why a writ of review should not issue herein as

prayed for, respectfully submits its demurrer to the petition for writ of review, and as grounds for demurrer alleges:

The petition for writ of review herein does not state grounds sufficient to constitute a cause of action, nor do the allegations or statements therein, or any of them, constitute grounds for the issuance of the writ as prayed for.

Respectfully submitted, Carl I. Wheat, Woodward M. Taylor, Attorneys for Respondent Railroad Commission of the State of California.

[fol. 61] [Title omitted]

Points and Authorities of Respondent Railroad Commission of the State of California

Preliminary Statement

This proceeding involves an order made by the Railroad Commission in a case originated in a complaint by a regularly certified carrier by automobile truck between Redlands and Los Angeles and its harbor, to the effect that the present petitioners are operating automobile trucks for compensation, as a business, between those points, in viola- of the so-called "Auto-Stage and Truck Transportation Act" (Chap. 213, Stats. 1917, as amended). A hearing was held at which it appeared that the defendants (petitioners herein) are engaged in the business of hauling citrus fruits to the harbor from the packing house of the Redlands Orange Growers' Association, a corporation, and back hauling materials and supplies for that organization. This carriage was claimed to be covered by an agreement termed by the defendants a "lease," a copy of which was [fol. 62] filed in the proceeding.

The Railroad Commission recognizes it has been vested with no jurisdiction over the carriage of persons or property by any person in automobile vehicles owned by him, or validly leased by him, unless, of course, he uses them to engage in the business of transportation over the highways under the above-mentioned regulatory statute. The Commission found, however, after a thorough examination of the document in question, that it did not constitute a "lease," but was rather a mere contract for hauling. Such

hauling was then found to fall within the language of Section 1 of said statute, as amended in 1919, and an order was made requiring defendants to discontinue the same unless and until they should have received a certificate of public convenience and necessity covering it.

The Question

We respectfully submit that the first question before the Court in these circumstances is whether or not the agreement under which this hauling was admittedly carried on constitutes in law a "lease" of those trucks to the Redlands Orange Growers' Association. If this question be determined in the affirmative the Commission's order must be annulled. If, however, the answer be that it is not a "lease" but is instead a contract to haul goods, the question arises whether the Legislature has, by this statute, attempted to vest regulatory authority over such contract haulage in the Railroad Commission, and, if so, whether it lies within the power of the Legislature to vest such power in any regulatory board or body, and whether, in any event, the Railroad Commission is a proper respesitory for such authority.

We will discuss these several questions in the order [fol. 63] mentioned.

I

The agreement under which this haulage was undertaken is not a "lease" but is a simple contract to haul goods for a stipulated rate.

Petitioners attack the construction placed by the Railroad Commission upon the so-called "lease," alleging that the Commission "saw fit to ignore and discard every salient provision of that agreement that determined its true nature." They then point out that the words of the agreement were that the four trucks and trailers were leased to the Association for a specified period; that the Association was to have sole and exclusive possession and use of them; that the trucks and trailers were to be used by the "lessors" for no other purpose; and that the legal use and possession of said property was solely in the Association. Apparently, petitioners consider these the salient provisions which determine the true nature of the instrument.

The respondent was not so impressed. It may be conceded that, standing alone, such provisions might evidence an intention of the parties to enter into a lease. But analizing the instrument as a whole, weighing those provisions against all the other provisions,—which is all the Commission did—points inevitably, we submit, to the conclusion that the real intent of the parties was to contract for the services of Frost & Frost rather than simply to lease four specific trucks and trailers. Why else should the agreement be predicated upon the skill of the lessors in transporting property of this nature (as set forth in the second recital clause) if it were not in truth, as it is expressly alleged in the third clause of recital, "to secure the services [fol. 64] of the first parties when desired, in the operation of said truck and trailers."

Although the alleged purpose of this instrument is to "lease" four specific trucks and trailers from the lessors to enable the lessee "to conduct and operate its own transportation system," and to exercise the sole and exclusive use and possession of them, yet the lessors are obligated to make all repairs, to furnish all oil, gas and other supplies, to drive and operate the trucks when requested and to supply all additional equipment that may be necessary if the four specific trucks and trailers are insufficient Can it be said with any show of reason that all these requirements are proper elements of a true lease of specific items of personal property, and that they are consistent with the expressed desire of the Association "to conduct and operate its own transportation system?" If the true intent of this instrument was to lease four specifically described trucks and trailers to the Association for the purpose of enabling it "to conduct and operate its own system of transportation," it was, we submit, entirely inconsistent to require the lessors to furnish, keep up, drive and operate any number of other or additional trucks when the "leased" ones prove insufficient for the needs of the Association. And especially does this become evident when viewed in connection with the undisputed evidence that one of the trucks named in th "lease" belonged to an outside third party, and that "upon certain occasions Frost & Frost procured additional equipment to carry out their agreement" with the Association. At the hearing held by the Commission upon this matter Counsel for the petitioners admitted that upon four

occasions a certain outside truck was used in carrying out "the contract between Frost & Frost and the Redlands Orange Growers' Association." What contract, may we ask? The contract to "lease" four specific trucks and [fol. 65] trailers, or the contract to transport? Again, Counsel admits "there are six, seven or eight other trucks which are leased for a trip or a period of time by Frost & Frost. They do * * * an extensive business and lease trucks. When they have insufficient trucks to carry out or to supply the needs of the Orange Growers' Association they then diverted or subleased them to the Orange Growers' Association * * *." This feature alone is sufficient, we feel, to negative the alleged desire of the Association "to conduct and operate its own transportation system." Certainly it clearly demonstrates that the real intention of the parties was not to "lease" four specific trucks and trailers but rather to contract for the hauling of its property.

Petitioner states to this Court (p. 56, Points & Authorities) that "the agreement expressly recognizes and states that the Association will be liable, in the event of negligence in the operation of said trucks, regardless of by whom actually driven, for injury to the person or property of others," but petitioner neglects to inform the Court that the so-called "lease" also provides that "the first parties (the present petitioners) agree to fully indemnify and protect second party in its liability to others, and to pay all claims against second party arising while said property is being driven by first parties, or either of them, or any driver employed by them, or on account of any defect in the leased property."

Here then, to the already onerous obligations of the "lessors" to repair, keep up, and furnish all supplies, is added the additional burden of indemnifying the "lessee" in the conduct and operation of what the latter claimed was its own transportation system. Furthermore, the "lessee" is relieved from all liability "from depreciation or damage to the leased propety from use, operation or other cause." [fol. 66] In other words, after a continued use of the "leased" property for a period of over six months in the "conduct and operation of its own transportation system," the "lessee" is exonerated from all liability for damage, depreciation or even destruction of the leased property, and is indemnified by the lessors for the negligent operation of

it. We cannot believe that such provisions are in any way consistent with a bona fide lease.

As the petitioner states, the respondent Commission was impressed by the fact that there was no specific "rental" provided in the "lease" All other provisions of the instrument are set forth with the utmost definiteness and specificity, but this one—usually the most important and specific—is left to the vicissitudes and uncertainties of an extraneous agreement of the parties, to be made in future, relative to the "reasonable value" of the service based upon the nature and weight of the property and the distance transported. Again the inquiry arises, if this were a bona fide lease of four specific trucks and trailers to enable the Association "to conduct and operate its own transportation system," why should the nature and weight of the property or the distance transported enter into the negotiations especially when, as here, the "lessees" were not to be liable for any damage or depreciation to the leased property. And why should the lease "declare that this reasonable value" "not be greater than the customary charge for similar services in the neighborhood?"

Finally, the term of the "lease" is for approximately six months, but it is provided that the Association (so-called "lessee") "may, at any time, terminate this lease." Except for its lack of mutuality there is nothing objectionable to this provision standing alone, but viewed in the light of all its accompanying provisions it, too, points strongly [fol. 67] to the conclusion that the Association was protecting itself against the completion of its fruit shipments prior to the date of termination of the "lease." The Association sets forth in the "lease" that it transports considerable property from place to place and enumerates four main types of that property. At least two of these types of property may reasonably be considered as being transported throughout the year, but it is a matter of common knowledge that the other two, viz, the transportation of citrus fruits from the ranches where grown to the packing houses of the Association, and the transportation of packed citrus fruits from its packing houses to the wharves, are carried on only during six months of the year, from December to June. In the face of these generally known facts, we submit that the provision for the termination of the "lease" strongly indicate an intention on the part of the Association

not "to conduct and operate its own transportation system," but rather an intent merely to contract for the transportation of its fruit crops.

It was only after a careful weighing of all the provisions of the so-called "lease" and a searching analysis of the entire instrument in the light of the admissions of Counsel and the exhibits introduced at the hearing, that the respondent Commission was forced to the conclusion that the salient features determining the true nature of the document were not those referred to by Counsel in his points and authorities, but those to which we have adverted at much length above. In short, the Commission simply attempted, from all competent evidence before it, to arrive at the true motives actuating the parties in the execution of this instrument. We believe it did not err.

[fol. 68]

II

The Legislature Has Vested Regulatory Authority Over Such Haulage in the Railroad Commission

Aside from the question of the authority of the Legislature to vest the powers here under consideration in the Railroad Commission (a matter which will be discussed below), petitioners have argued that the Legislature did not, in fact, attempt to do so, asserting that the word "or" in the pertinent provision of the act in question should be read "and." It is our opinion that such a construction would be far-fetched, illogical and directly opposed to the plain intent of the Legislature. A brief résumé of the history of this provision will therefore be of value at this time.

In 1879 the people of this state, under the new Constitution, vested in the Railroad Commission certain powers over railroads "and other transportation companies," including particularly the power "to establish rates of charges for the transportation of passengers and freight." The Public Utilities Act of 1911 did not cover automobile carriers, but shortly thereafter the carriage of passengers and freight by automobile having developed into a matter of state-wide concern, the Commission was petitioned to take jurisdiction over them for the purpose of regulation. This the Commission refused to do.

The matter was then presented to this Court and in 1916 it held that under Section 22 of Article XII of the Constitution, above mentioned, the people had vested jurisdiction over such carriage in the Commission, and, by writ of mandate, directed the Commission to assume such jurisdiction. In 1917 the State Legislature enacted a statute commonly known as the Auto Stage and Truck Transportation Act" (Chap. 213, Stats. 1917), defining the term [fol. 69] "transportation company" as applied to carriers by automobile, and vesting in the Railroad Commission certain large and definite regulatory powers thereover.

Among other things, this act defined the term "transportation company" to include

Every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any automobile, jitney bus, auto truck, stage or auto stage used in the transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route and not operating exclusively within the limmits of an incorporated city or town or of a city and county * * *" (With certain exceptions not here pertinent).

This provision clearly covers only automobile transportation by "common carriers." In 1919, however, as mentioned in petitioners' memorandum of points and authorities, the Legislature amended this provision to make its pertinent clause cover vehicles

"used in the business of transportation of persons or property, or as a common carrier" (Chap. 280, Stats. 1919).

The universal belief was then, and has been ever since, that this amendment constituted an attempt on the part of the Legislature to vest in the Railroad Commission regulatory authority over automobile carriers for hire over regular routes and between fixed termini,—if that were their regular business,—even through they might carry on that business only through private agreements rather than as common carriers. The method adopted to accomplish this end was to add the words "the business of" and the very important word "or" to the definition section of this

statute. We assume that these words must have some significance, and while it is true that courts have at times declared that the word "or," as used in a statute, should be construed as "and," and vice versa, such a determination is never made when the word as used gives a definite [fol. 70] and logical significance to the passage in question.

We submit that the instant case presents a situation of that character. It is common knowledge that the movement to bring more and more types of business under regulation was at its height at this time. If read as "and," the inserted word adds nothing,—changes nothing—bears no significance whatsoever. Yet the Legislature surely meant something by it, and if it is read as "or" we find that something. Thus read, it adds a new classification of carriers attempted to be placed under regulation, and this, we firmly believe, was the legislative intent. We submit that this word should not be nullified, and we further submit that petitioners have shown no valid reason for such drastic and illogical action.

As we have seen, the Commission did not seek automobile stage and truck jurisdiction in the first place, and certainly did not seek the increased jurisdiction thus attempted to be given by this amendment. Indeed, notwithstanding this statutory change, and contrary to the implication of Counsel's somewhat invidious remark as to the Railroad Commission being "ever zealous in seeking to extend its authority" (Memo. of Pts. and Auths., p. 56), the Commission did not find it necessary to pass upon this question of contract carriage until October, 1923, when the matter was placed squarely before it and the issue was forced upon it by the filing of a complaint against certain persons alleged to be operating automobile trucks in violation of this act. In its decision in that case the Commission declared that although the defendants were not operating as common carriers, it must take jurisdiction over the operations in question since it was carriage handled as a business over the public highways between fixed termini and over a regular route. Thus the Commission gave a practical interpretation to the provisions in question, which we assume is entitled to some weight since it is the admini- [fol. 71] strative body charged with the detailed enforcement of this act.

The present case came before the Commission in much the same manner as did the one above referred to, and presented an almost identical situation. The Commission therefore felt forced to take a similar position. As stated by Counsel in his memorandum of points and authorities, it has been the consistent policy of this Commission, since its inception, to endeavor to enforce the legislative mandate as expressed in the statutes under which it operates, without itself assuming the judicial function of declaring such statutes, or portions thereof, violative of the state or federal constitution. It has deemed it to be its plain duty to leave such matters to be determined by the courts. The recent East Bay Municipal Utilities District case represents perhaps the single exception to this policy, and in that case the Commission refused to act pursuant to the statute because it was thoroughly convinced that the provision in question was beyond the power of the Legislature to enact, and both parties recognized this possibility and requested the Commission to refuse to take jurisdiction, in order to facilitate an early determination of the question by this Court, thus saving the public both the large sums of money and the considerable time which would have been required had the matter gone on regularly before the Commission. None of these considerations are found in the present proceeding, and while the Commission recognizes the serious character of the constitutional questions here involved, it feels that such questions must be determined by the Court and not by the regulatory body. We submit that the statute here in question can bear no other reasonable interpretation than an attempt to confer jurisdiction upon the Railroad Commission over contract carriage as a business over regular routes or between fixed [fol. 72] termini, and that the Commission proceeded correctly in assuming such jurisdiction in the first instance.

[fol. 73]

III

The Vesting of Such Authority in a Regulatory Commission is a Valid and Constitutional Exercise of the State's Residuary "Police Power."

If the class of motor vehicle operators here sought to be regulated can logically, naturally and reasonably be said to be different in character from those classes not so sought

to be regulated, and if the regulation sought to be imposed bears some reasonable relation to such difference in kind and to the end sought to be attained, the classification is valid. We assume that the citation of authority upon this principle would be a mere act of supererogation. (1)

It is a principle of our law so well settled as to admit of no reasonable doubt that the State may at any time limit the complete freedom of individual contract by measures and regulations under its residuary sovereign powers looking to the conservation of the safety, health and general welfare of the people. The power to impose such regulations has been called the "police power." Its extent has never been defined and is probably not capable of delimitation by definition. This very court once pertinently declared that

"The courts, even the highest court of the land, have despaired of giving a satisfactory definition to the police power of a state,—a definition which will delimit the boundaries of that power."

[fol. 74] At the same time, it was added that

"Within the legitimate exercise of this great power comes the unquestioned right to place restrictions upon personal liberty and limitations upon the use of private property." (2)

It is one of the paramount duties of the State to provide the means whereby its highways,—built and maintained with public money,—may be kept safe for public travel and adequate for public needs, and any use thereof as a general

---

(1) As was declared by the Federal District Court for the Southern District of New York in the case of Holding Co. v. Feldman, 269 Fed. 306 (1920):

"If the power of classification by Legislatures was ever judicially limited, the effort has been abandoned, unless some limitation can be found in the statement that a distinction is arbitrary, where 'no state of facts reasonably can be conceived that would sustain it.' (Rast v. Van Deman, 240 U. S. 342, 608 L. ed. 679.) No such rule, if it be a rule, finds application here. It is unnecessary to further parade decisions; from the Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394, to that of the Producers' Company, supra, at the last term of Court, all the Fourteenth Amendment decisions are alike in refusing dogmatic definition and avoiding production of results by an inexorable legal logic; much, indeed most, has been left to circumstances as they arose, so that reported cases are not so much precedents of law as instructive and illustrative historical incidents; the effort has been to apply a sort of 'rule of reason' to eternally changing facts."

(2) Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640.

business, where operations are carried on back and forth over regular routes or between fixed termini is, we submit, a proper subject of reasonable regulation.

Is the regulation here under consideration such reasonable regulation? It is if the classification above mentioned is reasonable, and if the regulation itself bears some logical relation to public safety, health, or general welfare. The resolution of these fundamental questions depends, we submit, upon economic considerations of recent development and broad scope, which we now desire briefly to review.

The rapid rise of the use of motor vehicles has been one of the most phenomenal economic developments of the last twenty-five years. In that short space of time the automobile and the motor truck have come into almost universal use for purposes both of pleasure and of business. Highways that were sufficient for horse-drawn vehicles proved utterly inadequate for motor vehicles, and the country has accordingly necessarily and suddenly been covered with improved highways along the lines of densest traffic. This transformation has cost immense sums of money, which in most states, including California, have in large part been raised by long time bonds. Individual counties have also spent very large sums, and certain aid has been received from the Federal Government.

[fol. 75] These highways, as is common knowledge, are crowded with passenger automobiles and with motor trucks moving freight in private business and also as common carriers for the transportation of freight and passengers.

The multiplication upon the highways of heavy, high-powered vehicles, operated at high speed, has produced conditions of danger which were unknown in the days of horse-drawn vehicles, and the intensive use to which they are put is most destructive to the highways themselves. Several million dollars is required each year for the upkeep of California State Highways alone, not to mention the large sums spent by counties and cities. To control the use of these highways in such manner as to permit of their maximum usefulness and efficiency, to ensure the safety of persons traveling thereon and the preservation thereof from destruction by improper vehicular use makes necessary governmental regulation of motor vehicle operation.

Every state has recognized this fact and each has passed laws regulating the operation of motor vehicles over its

highways—statutes requiring the payment of fees designed to be used for highway maintenance, statutes requiring the licensing of operators, speed regulating statutes, maximum load statutes, statutes providing for night lighting and the like. These requirements are all examples of the exercise of that residuary power of sovereignty under which the various states have been enabled to cope with developing social and economic conditions, particularly those which affect the health, safety and general welfare of their people.

As was said by Mr. Justice McKenna the Michigan Blue Sky Case (Merrick v. Halsey & Co., 242 U. S. 568; 61 L. ed. 498), while a written constitution places in unchanging form limitations upon legislative action, this "does not mean that the form is so rigid as to make government inadequate [fol. 76] to the changing condition of life, preventing its exertion except by amendments to the organic law."

The motor vehicle was first subjected to regulation for the protection of public safety and for the collection of funds to maintain the highways. The advent of motor vehicles used as a business for the sale of transportation over these highways, either as a common carrier or under private arrangements, has presented a difficult problem because it was a service of value to the public, and therefore to be permitted a proper development, and yet it threatens the public with serious added dangers, both to the public safety and to the preservation of the highways. Such business has become of great economic importance, and in so far as its regulation concerns common carriers it has been universally sustained. We are here confronted with the reasonableness of an attempt to regulate it on its non common carrier aspects.

An examination of the authority sought to be vested in the administrative body by the statute here under consideration discloses that there is no attempt to regulate the general right of a citizen to contract with whom he will to perform transportation service. No mere isolated contract for hauling by a truck or automobile owner is sought to be covered, nor is such an owner made subject to control as to sporadic hauling hither and yon where the business is not between fixed termini or over a regular route. It is only when:

1. he uses the publicly built and maintained highways
2. as a regular business for private gain
3. to transport persons or property
A. over a regular route or
B. between fixed termini

that his operations are declared subject to regulation.

This classification is, we submit, sound, reasonable and based upon a logical difference in character between the class of vehicles the operation of which is sought to be regulated and other vehicles not used by their owners as a [fol. 77] business over the highways between fixed termini or over regular routes. A similar situation was presented in the so-called chauffeur's license case (In Re Stork, 167 Cal. 294) in which this court declared that:

"There are unquestionable elements of similarity, even of identity, between the driving of an automobile by a professional chauffeur and the driving of a like vehicle by a private owner, designated in this act as an 'operator'. Thus it may not be gainsaid that the ignorance of the one is as likely to result in accident as the same ignorance upon the part of the other. The recklessness of the one is as likely to result in injury as the recklessness of the other. It is equally dangerous to other occupants and users of the highway whether the unskilled or reckless driver be a chauffeur or 'operator.' All these matters may be conceded, and yet there are others of equal significance where the difference between the two classes of drivers are radical. Of first importance in this is the fact that the chauffeur offers his services to the public and is frequently a carrier of the general public. These circumstances put professional chauffeurs in a class by themselves and entitle the public to receive the protection which the legislature may accord in making provision for the competency and carefulness of such drivers. The chauffeur, generally speaking, is not driving his own car. He is intrusted with the property of others. In the nature of things a different amount of care will ordinarily be exercised by such a driver than will be exercised by the man driving his own car and risking his own property. Many other considerations of like nature will readily present themselves, but enough has been said to show that there are sound, just, and valid reasons for the classification adopted. The argument of the

peril attending the public at the hands of the unlicensed operator driving his own car is not without force, but it can only successfully be presented to the legislative department and not to the courts.

"In conclusion it may be said that while on reason we hold the classification to be sound and the license fee therefore legal, no case where any court of last resort has taken a contrary view has been called to our attention, while, besides the intimations in the cases above cited, this precise conclusion was adopted by the court of appeals of Maryland in Ruggles v. State, 120 Md. 553 (87 Atl. 1080)."

The situation presented in the Stock case is patently much akin to the present. Motor vehicles operated as a business over highways are ordinarily more cumbersome and heavy, and carry greater loads than do privately operated vehicles. They tend to overcrowd the highways, and to increase the hazards incident to travel thereon greatly out of proportion to the number of such vehicles, as [fol. 78] compared with other privately operated vehicles. By reason of their weight, the loads they carry, the character of the service they perform and particularly the constancy of their operation, motor vehicles so operating injure the highways far more in proportion than do those other privately operated vehicles which are merely used as incidental to the main business of their owners or lessors. The class of operators here sought to be regulated use their vehicles as the main basis for their livelihood, i. e., as a business. Therein lies the real difference, and we submit that there is a real, natural, intrinsic, reasonable and constitutional distinction between an automobile operator who uses the public highways as a means of livelihood and an operator who uses them merely to transport his own property. As stated by the Attorney General of this State in a recent brief before this Court, such an operator for hire "enjoys a different and wider use of the public highways" and "The line is drawn between a business of using the highways for profit and that use of the highways which is not such a business."

The cases in which the courts have declared valid the actions of states in seeking to regulate the use of the public highways as a business, are very numerous. It is ele-

mentary that the right of control by the state over its highways and their use is plenary. That authority is perhaps even more plenary when the streets and highways are attempted to be used for private gain, since such use by an individual must of necessity interfere with, and encroach upon, their use by the general public.

It was evidently with this thought in mind that the Supreme Court of the State of Washington in the case of Hadfield v. Lundin, 98 Wash. 657 (1917); 168 Pac. 516; L. R. A. 1918 B. 909; Am. Cas. 1916 C. 942, said:

"If any proposition may be said to be established by authority, the right of the state in the exercise of its police [fol. 79] power to prohibit the use of the streets as a place of private business, or as the chief instrumentality in conducting such business, must be held so established."

And again:

"No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege, and not as a matter of natural right." (Citing numerous cases.)

And on page 517 of the same case, the Court said:

"These cases, though involving regulatory statutes or ordinances, all recognize and are based upon the fundamental ground that the sovereign state has plenary control of the streets and highways, and, in the exercise of its police power, may absolutely prohibit the use of the streets as a place for the prosecution of a private business."

The Supreme Court of Rhode Island expressed its opinion upon the question in similar language in Gizzarelli v. Presby, 117 Atl. 359 (1922), saying:

"Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege. * * *

"Due consideration of the safety of the public requires that a careful selection should be made of the individual to

whom authority is given to use the public highways as carriers of passengers for hire. * * *

The next case, Dickey vs. Davis, 76 W. Va. 576; 85 S. E. 781, beginning on page 782 of the Southeastern report, the court said:

"The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the legislature, for the preservation of such right is the principal purpose of the constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic evils, such as gaming, the liquor traffic, and numerous others. To this list may be added such useful occu- [fol. 80] pations as may, under certain circumstances, become public or private nuisances because offensive or dangerous to health. All of these fall within the broad power of prohibition or suppression, some wholly and absolutely, and others conditionally. Such pursuits as agriculture, merchandising, manufacturing, and industrial trades, cannot be dealt with at will by the legislature. As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and with private means. But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. Such properties are devoted primarily to general and public, not special or private uses, and then they fall within almost plenary legislative power and control. In them, all citizens have the usual and ordinary rights in an equal degree and to an equal extent. In the regulation thereof, the legislature cannot discriminate. But, as regards unusual and extraordinary rights respecting public properties, its power of control and regulation is much more extensive. Such rights are in the nature of concessions by the public, wherefore the Legislature may give or withhold them at pleasure" * * *

Then follows very pertinent language showing the distinction between the use of a public highway for business as distinguished from the ordinary common everyday use of

the highway in which the public generally participates. That part of the opinion reads as follows:

"The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all; while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but as to the latter its power is broader; the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

One of the most recent state decisions on this subject is that of the Supreme Court of Oklahoma in the case of Ex Parte Tindall, 229 Pac. 125, dated Sept. 9, 1924. This decision, in which the motor carrier regulation act of Oklahoma was broadly sustained, relates chiefly to common car-
[fol. 81] rier operation, but certain of its language is, we submit, directly applicable to the case in hand. Said the Court:

"In the class of business sought to be regulated by this act the public has an interest, a twofold interest, one from a standpoint of convenience and necessity, the other from the standpoint of public property rights, *in the appropriation and use of its public highways.*

"It is a matter of common knowledge, therefore, one of which courts will take cognizance, that the advent of throngs of automobiles and motor vehicles has necessitated the building of paved roads at a burdensome expense to the public. The public, as such, is therefore vested with a property right in such highways, and it is folly to argue that the public has no voice as to who shall appropriate its highways to their own free use and then charge the public a profit for such use. *The property of the public can no more be taken and appropriated to the use, benefit and profit of private enterprises, without due process of law and fair compensation, than the property of a private enterprise can be*

taken by the public without due process of law and fair compensation. Reasonable regulation of transportation companies, operating over public highways, is no more nor less than a valid and reasonable protection against the *appropriation of public property* by private individuals without due process of law and without compensation." (Underscoring ours.)

Only last week (January 21, 1925) the District Court of Appeals of this State for the First Appellate District, speaking through Mr. Justice Tyler, declared, in the case of People vs. Yahne that,

"The streets and highways belong to the public, They are built and maintained at public expense for use in the ordinary and customary manner. The regulation of the use of the highways is a matter which belongs exclusively to the state government. *The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business differs radically and obviously from that of one who makes the highways his place of business, and uses them for private gain in the operation of a stage coach. The former is the usual and ordinary right of a citizen, a right common to all, while the latter is special, unusual and extraordinary.* As to the former the extent of legislative power is that of regulation, but as to the latter its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others because of its extraordinary character (Hadfield vs. Lundin, 78 Wash. 657). In other words, while the right to use the highways for motor vehicle traffic may not be absolute, [fol. 82] other vehicles for hire may be denied (Lane vs. Whitaker, 275 Fed. 475; Star Transportation Co. vs. Mason, 196 Iowa, 930; Huddy on Automobiles, Sec. 165). No private individual or company has the right to the use of the highways in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state, or its agencies, as the case may be. *The use of the streets or highways as places of business or as a main instrumenality of business is accorded as a mere privilege and not as a matter of natural right* (Hadfield vs. Lundin, supra; Northern Pac. Ry. Co. vs. Schoenfeldt, 123 Wash. 579)." (Underscoring ours.)

The most important case of all, however, is no doubt the decision of the United States Supreme Court rendered on Jan. 12, 1925, in the matter of Michigan Public Utilities Commission v. Duke. In that case the Court, speaking through Mr. Justice Butler, declared that no state may, by mere legislative fiat, "convert property used exclusively in the business of a private carrier into a public utility" or "make the owner a public carrier." As we have mentioned above, there is no attempt in this case to do any such thing. All that the California statute attempts to do is to declare amen*d*able to reasonable regulation vehicles used upon the public highways in the business of transportation for hire. And as to such regulation, bearing as it does a close connection with the public safety and that of the public's property, the court by inference draws a distinction, for, said the court,

"Clearly these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways."

We submit that the regulation here in question does bear direct relation to public safety and order, that the classification is germane to the purpose sought to be accomplished, and that by this language the Supreme Court has inferentially declared it valid.

[fol. 83] IV

The Railroad Commission is a Proper Repository of Such Authority

Assuming that the carriage here in question is under a mere contract for transportation rather than a lease, that the statute as worded covers the regulation of such carriage, and that the state has the power to vest regulatory authority thereover in some administrative tribunal, the question still remains as to the authority of the Legislature to vest such authority in the Railroad Commission.

In the first place, as a practical matter, and entirely aside from the legal phase of this subject discussed below, we submit that if the Legislature desired in fact to impose such regulation as is here under consideration it would

quite logically turn to the Railroad Commission as the agency through which to do it. It is already in action; it has the machinery; it is dealing with related matters, and it is probably the most advantageously situated of all existing state bodies for the undertaking of such duties. If it can constitutionally be given to any commission, the Railroad Commission would appear to be the logical and reasonable repository of this power.

In considering the constitutionality of such delegation of power, it should be noted that the Railroad Commission was originally given limited jurisdiction over "railroads and other transportation companies" in 1879, but that in 1911 this provision (Section 22 of Article XII) was greatly broadened, particularly by the addition of the following:

"No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution."

[fol. 84] Under the doctrines set forth in the opinions of the Justices in the leading case of Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, it would seem that if the regulation here in question be cognate and germane to the regulation of "transportation companies" as that term is defined in this constitutional provision, the Legislature might validly place it in the hands of the Railroad Commission. Section 23—the next section of the Constitution—relates specifically to "public utilities," and this regulation clearly does not fall within that provision, but we find no words in section 22 that would appear, even by implication, to limit the term "transportation company" as there used to common carrier transportation companies. And if it is not so limited, we submit that the Railroad Commission may validly be given authority over transportation companies that are not common carriers.

This brings us to the question as to whether the legislature possesses authority to define that term to include non-common carriers, and again we say, we find no express

provision forbidding such action, nor any provision that in our opinion would lead to that implication, and in the absence thereof it would appear proper for the Legislature to take such action under the broad powers granted by the provision above quoted. And if it be within the power of the Legislature so to define this term, we submit that the regulation in question, dealing directly with the operations of such "transportation companies" is "cognate and germane" to the regulation thereof.

The decisions dealing generally with the subject of the delegation of powers give little assistance in the solution of this problem. It is clear, however, as recently delared by the Supreme Court of Wisconsin, that

[fol. 85] "The legislature may properly designate any agency it sees fit within the state, reasonably calculated to act justly in the matter, to nominate persons for appointment to administer its mere police powers." (State v. Chittenden, 127 Wis. 468; 107 N. W. 500.)

In our case, what agency could be found more "reasonably calculated to act justly in the matter" than the Railroad Commission, already existing, and dealing with related problems? If from its own point of view it could be given the power, we submit that it is clear that the Legislature could designate it as the repository.

[fol. 86] V

We desire to advert to but one further matter. There appears to be no contention upon the part of these petitioners that the portions of this statute of which they complain are not separable from the remaining portions. We deem it necessary to touch upon that question but briefly. The situation here confronting the court is one in which the Legislature took an already existing, complete, working and workable statute, and by amendment sought to bring within its provision persons not formerly subject to it. If the court should hold that this attempt upon the part of the Legislature was unconstitutional, we submit that the remaining portion of the statute must be held to remain in force just as it was prior to the amendment.

The act contains a "saving clause" reading as follows:

"If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional,

such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional."

We submit that under this provision, (which though not "an inexorable command" is very persuasive as to the legislative intent,) this prior workable, separable and complete act would continue in force, and that the general regulatory authority over common carriers by automobile which has been exercised by the Railroad Commission under that statute since 1917 would remain unabated and undiminished, irrespective of the determination upon the questions presented by those petitioners.

Such a conclusion would be in harmony with the frequently expressed judgment of this court in other cases wherein the various portions of statutes were held severable, and we will therefore close this discussion by quoting from Cooley on Constitutional Limitations regarding this matter.

[fol. 87] "The constitutional and unconstitutional provisions may even be contained in *the same section* and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, *when the unconstitutional portion is stricken out, that which remains is complete with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.* If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other." (Italics ours.)

Respectfully submitted, Carl I. Wheat, Woodward M. Taylor, Attorneys for Respondent Railroad Commission of the State of California.

[fol. 87a] [File endorsement omitted]

Received copy of original this 26th of Jan. 1925.
Leonard, Surr & Hellyer, Attys. for Petitioners.

[fol. 88] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER TO SHOW CAUSE

Upon reading and filing the petition for Writ of Review filed herein by the above named petitioners, and good cause appearing therefor, it is ordered that the respondents above named be and appear before this court at its court room in the Pacific Finance Building, City of Los Angeles, California, on Monday, January 26th, 1925, at two o'clock p. m., and show cause, if any they have, why a Writ of Review should not issue from this court as prayed for in the Petition for such Writ above referred to.

Witness the Hon. Louis W. Myers, Chief Justice of the Supreme Court of the State of California, and the seal of said court this 12th day of January, 1925.

B. Grant Taylor, Clerk of Supreme Court of the State of California, by Hugh P. Coultis, Deputy. (Seal.)

[fol. 89] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

Bank

[Title omitted]

OPINION—Filed October 1, 1925

Review to annul a decision and order of the respondent commission commanding petitioners to desist from the transportation of property by auto truck over a regular route and between fixed termini upon the public highways of the state for compensation unless and until they shall obtain a certificate of public convenience and necessity so to do from the respondent commission. Petitioners were engaged in the transportation of citrus fruits belonging to the Redlands Orange Growers Association, a corporation, between the City of Redlands and Los Angeles harbor in this state, pursuant to a contract with said association.

Petitioners were brought regularly before the commission to answer to a complaint of a competing carrier who was engaged in the transportation of property between those points as a common carrier under a certificate of public convenience and necessity issued by the commission, and who alleged that the business of transportation being carried on by petitioners under their contract with the Redlands Orange Growers Association, without the issuance of a certificate of public convenience and necessity, was in violation of the Auto Stage & Truck Transportation Act (Sts. 1917, p. 330) as amended (Stats. 1919, p. 458). There is [fol. 90] no dispute as to any of the facts herein. All of the essential facts are conceded to be correctly set forth in the allegations of the petition and the exhibits attached thereto. Petitioners had entered into a purported contract of lease with the Redlands Orange Growers Association whereby petitioners purported to lease to the association certain auto trucks owned by petitioners to be used by the association in the transportation of its fruit from Redlands to Los Angeles harbor, but which trucks were to be operated in such transportation by petitioners. The commission, after an analysis of the provisions of the purported lease, found and determined, correctly as we think, that the same did not constitute a lease and that the real contract between the parties was a contract for transportation whereby petitioners undertook and agreed to transport the fruit of the association between Redlands and Los Angeles harbor during the period of time and for the compensation therein specified. The correctness of this conclusion of the respondent commission is not seriously questioned by petitioners herein, and the question is, therefore, whether one who is engaged as a business in the transportation of property by auto truck for compensation over the public highways of the state between fixed termini and over a regular route, but operating solely under a private contract, is subject to the provisions of the Auto Stage & Truck Transportation Act, supra, as amended. Section 1 of the act defines the term "transportation company" as used therein to include every person "operating * * * any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation over any public

highway in this state between fixed termini or over a regular route, * * * (with certain exceptions not pertinent herein). The italicized words "business of" and "or" were added to the section by the amendment of 1919. Petitioners would have us in construing this section read the phrase "or as a common carrier" as if it were "and as a [fol. 91] common carrier," substituting the conjunctive "and" in place of the disjunctive "or," and thus conclude that the act as amended is applicable only to those who are engaged in such business of transportation as common carriers. We are unable to adopt this conclusion. To so hold would be to say, in effect, that the legislature accomplished nothing and intended nothing by this amendment. The definition of "transportation companies" contained in this section of the act as originally enacted plainly and unmistakably limited the same to common carriers. If any meaning or purpose whatsoever is to be ascribed to the amendment of 1919, it can be only *only* the meaning and purpose of extending the act to make it applicable also to private carriers of the sort there described.

The question then arises whether under the provisions of the state and federal constitutions the act is valid in its application to such private carriers. Various points relating to this question are ably discussed by counsel and by amici curiae who have filed briefs herein. It is contended in behalf of petitioners that this act in its application to private carriers has the effect of transforming them into public carriers by legislative fiat. Counsel for respondents vigorously deny that such is the effect, but it cannot be denied that the provisions of the act as applied to private carriers do closely approximate this result. Section 2 provides that no transportation company may operate "except in accordance with the provisions of this act." Section 3 forbids such operation unless a permit has first been secured as therein provided, and requires the applicant for such permit to specify the highways and the route over which the applicant intends to operate, and furnish description of each vehicle which applicant intends to use, including the seating capacity thereof if for passenger traffic, or the tonnage if for freight traffic, together with a schedule or tariff showing the passenger fares or freight rates to be charged. It provides that such permit may be issued [fol. 92] or refused, or issued upon such terms and condi-

tions as in the judgment of the commission the public convenience and necessity may require. It provides further that no permit so issued may be assigned or transferred without the consent of the granting authority. Section 4 empowers the railroad commission to supervise and regulate every such transportation company, to fix its rates, fares, charges, classifications, rules and regulations, to regulate its accounts, service and safety of operations, to require the filing of annual and other reports, and to supervise and regulate transportation companies "in all other matters affecting the relationship between such companies and the traveling and shipping public." Section 5 forbids operation even under a franchise or permit granted by any incorporated city or town, city and county, or county, without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require the exercise of such right or privilege, and provides further that the commission may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require. Section 6 forbids the issuance of any stock, stock certificate or bond by such transportation company except pursuant to an order first secured from the railroad commission. Section 7 provides that as to applications and complaints and procedure subsequent thereto all transportation companies will be subject to regulation by the commission "under the conditions and subject to the limitations and with the effect specified in the public utilities act." Section 8 makes the violation of any of the provisions of the act or of any order, decision, rule, regulation or direction of the commission a misdemeanor and prescribes the punishment therefor. Furthermore, if the legislature is competent to thus define "transportation companies" to include private carriers, it follows that they cannot raise any charge or rate without first securing the consent of the railroad commission (Const. Art. XII, sec. [fol. 93] 20), cannot accord to one person any rate or facility different from that accorded to any other person (Const. Art. XII, sec. 21), and cannot render a transportation service for any rate or charge less than that named in the tariff rates established by the commission (Const. Art. XII, sec. 22). A carrier who files with the railroad commission a schedule of his routes, tariffs and charges, whe

is under compulsion to render transportation service of the kind, character and quality prescribed by the commission, who is disabled to enter into a contract for the rendition of transportation service of any kind, quality or character different from that prescribed, or for a rate of compensation either greater or less than the prescribed rate, is at least subjected to the disabilities and limitations which circumscribe a public or common carrier (10 C. J. 37, st. seq.). It is conceded that the state has no power by mere legislative fiat, or even by constitutional enactment, to transmute a private utility into a public utility, or a private carrier into a public carrier (Producers Transportation Co. v. R. R. Comm., 176 Cal. 499; Associated Pipe Line Co. vs. R. R. Comm., 176 Cal. 518; Van Hoosear v. R. R. Comm., 184 Cal. 553; Allen v. R. R. Comm., 179 Cal. 68; Stratton v. R. R. Comm., 186 Cal. 119; McCullagh v. R. R. Comm., 190 Cal. 13; Richardson v. R. R. Comm., 191 Cal. 716; Klatt v. R. R. Comm., 192 Cal. 689; Producers Transportation Co. v. R. R. Comm., 251 U. S. 228). It is argued by respondents, however, that the state does have the power either to grant to or withhold from its citizens the privilege of using its public highway for the purpose of transacting their private business thereon. As was said by the Supreme Court of West Virginia (Dickey v. Davis, 76 W. Va. 576, 85 S. E. 781):

"The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business differs radically and obviously from that [fol. 94] of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all; while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but as to the latter its power is broader; the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

The argument is that the privilege of using the public highways as a place for the transaction of private business

is not a vested right but a privilege which the state may grant or withhold at its pleasure; that having the right to withhold such privileges it may grant the same upon such terms and conditions as it may see fit to impose; that it may say in effect to the applicant for such special privilege, "I will grant you the privilege of using the public highways for private gain in the transaction of your business upon the condition that you in turn shall dedicate the property used by you in such business to the public use of public transportation." There is much force in this contention. It has been repeatedly decided that the right of a common carrier to use the public highways for the conduct of his business as such is not a vested or natural right, but is a mere privilege or license which the legislature may grant or withhold in its discretion, or which it may grant upon such conditions as it may see fit to impose (Ex parte Lee, 28 Cal. App. 719, 153 Pac. 922; Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B 909, Ann. Cas. 1918 C 942; Le Blanc v. City of [fol. 95] New Orleans (La.) 70 Sou. 212; Greene v. City of San Antonio (Tex.) 178 S. W. 6; Gizzarelli v. Presbrey (R. I.), 117 Atl. 359; Morin v. Nunan, 91 N. J. Law, 506, 103 Atl. 378; Lutz v. City of New Orleans, 235 Fed. 978; Cummins v. Jones (Ore.), 155 Pac. 171; Packard v. Benton, 264 U. S. 140; Memphis St. Ry. Co. v. Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635; Cutrona v. Mayor, etc. (Del.) 124 Atl. 658; Taylor v. Smith (Va.) 124 S. E. 259; Schoenfeld v. Seattle, 265 Fed. 726; Ex parte Tindall (Okla.) 229 Pac. 125; Pub. Service Comm. v. Fox, 160 N. Y. S. 59; Ex parte Sullivan (Tex), 178 S. W. 537; Child v. Bemus, 17 R. I.. 230, 12 L. R. A. 57; Ex parte Bogle (Tex.), 179 S. W. 1193; Fifth Ave. Coach Co. v. N. Y., 194 N. Y. 19, 21 L. R. A. (N. S.), 744, 16 Ann. Cas. 695). The Supreme Court of Washington said in Hadfield v. Lundin, supra: "If any proposition may be said to be established by authority, the right of the state in the exercise of its police power to prohibit the use of the streets as a place of private business, or as the chief instrumentality in conducting such business, must be held so established. Nor can it be questioned that the power to prohibit includes the power to regulate even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power to prohibit exists, the reasonableness of any regulation is

palpably a legislative question, pure and simple." The foregoing cases all had to do with the right of common carriers. Whether the same rule should apply with equal force to private carriers engaged in using the streets as a place of private business or as the chief instrumentality in conducting such business has not been directly passed upon in any case which has come to our notice except as it may be said to have been impliedly adjudged in State v. Price (Wash.) 210 Pac. 787. Upon principle, however, we perceive no reason why the rule should not apply with equal force to the case of a private carrier who proposes to use [fol. 96] the street as a place of private business or as the chief instrumentality thereof. The rule does not rest upon the circumstance alone that the carrier is engaged in operating a public utility and that his business is therefore affected with a public interest, but it rests equally upon the circumstance that he is using the public highways as the chief instrumentality of a private business conducted for private gain. In other words, he is enjoying a special privilege in the highways which are constructed and maintained at public expense and designed for the common use of all. Many of the cases expressly rest their decisions upon this latter ground. We are of the opinion that the state has the right in the granting of such special privileges in its public highways to require that the recipient thereof in consideration therefor return a reasonable quid pro quo to the public and that such in effect is what was done in and by the 1919 amendment to the Auto Stage & Transportation Act. The recent decision of the Supreme Court of the United States in the case of Michigan Public Utilities Commission v. Duke (54 Sup. Ct. Rep. 191) seems at first blush to be at variance with this conclusion, but we think that upon analysis it will be found not to conflict therewith. The Michigan statute is essentially similar to our Auto Stage and Truck Transportation Act in its relation to the questions here under consideration, except that it expressly provides what is claimed to be the necessary implication of our own statute, namely "any and all persons * * * engaged * * * in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state between fixed termini or over a regular route shall be common carriers * * *." It also prohibits the engaging in the business

of such transportation without a permit from the Public Utilities Commission which shall be issued in accordance with the public convenience and necessity, and requires the payment of fees, the carrying of insurance and the furnishing of an indemnity bond. Duke was engaged in the trans-
[fol. 97] portation by auto truck of automobile bodies from Detroit, Michigan, to Toledo, Ohio, under three private contracts with the manufacturers thereof. He had been doing such hauling for some years and had a large investment in property used exclusively for that purpose, was engaged in no other business and did not hold himself out as a carrier for the public. The court held that the requirements and limitations of the statute as applied to him would impose an unlawful burden upon interstate commerce. It also said: "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment." (Citing cases.) The essential difference between that case and this rests in the fact that Duke was operating under contracts subsisting before and at the time of the enactment of the Michigan statute, which contracts remained in part unperformed. The statute afforded to him no liberty of choice. It required him to devote his property at once to public transportation and thus would have disabled him to perform his subsisting contracts. To give it effect in its application to his situation would have been to impair the obligation of those contracts. If the contracts under which petitioners herein are operating had been entered into prior to the enactment of the 1919 amendment to our statute, and had been then subsisting and unperformed, petitioners would have been in position to invoke the authority of the Duke case. But petitioners' contracts were not made until 1923 and they were under no compulsion to enter into it. They were free to elect as to whether they would engage in the business of transportation upon the public highways between fixed termini or over a regular route and thus subject themselves to the
[fol. 98] conditions and limitations of the statute, or

whether they would refrain from so doing and thus retain their status of unregulated private carriers. They voluntarily chose the former course and thereby subjected themselves to the regulations imposed by the statute. The following language from the opinion in Le Blanc v. City of New Orleans, supra, is pertinent in this connection:

"The streets of the cities and towns of Louisiana being among the things that are 'public' and 'for the common use,' no individual can have a property right in such use for the purposes of his private business, unless, speaking generally, that business being in the nature of a public service or convenience, such as would authorize the grant, the right has been granted by the state, which alone has the power to make or authorize it, or, by the particular city or town, acting under the authority of the state, and in such case the right can be exercised only in accordance with the conditions of the grant; that is to say, an individual seeking, but not possessing, a right of that kind, may accept the grant, with the conditions imposed by the offer, in which case he becomes bound by the conditions, or he may refuse to accept the conditions, in which case there is no grant, and without the grant so offered, or some other, from the authority competent to make it, he can never acquire the right to make use of a street as his place of business."

Aside from the foregoing considerations it would seem that the fact that petitioners' business is of necessity carried on almost wholly upon the public highways would of itself cause such business to be so affected with a public interest as to subject it to governmental regulation, but as [fol. 99] this point has not been discussed by counsel, we do not pursue it further.

It is contended that the constitution does not and the legislature cannot confer upon the railroad commission jurisdiction or authority to supervise or regulate a private act of the nature involved herein or the business of a private carrier. The constitution provides (Art. XII, sec. 22): "Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies." In the case of Western Association of Short Line Railroads v. Railroad Commission, 173 Cal. 802, it was held that this section of the constitution was self-executing to the extent

that it conferred upon the commission regulatory powers over companies transporting freight or passengers as common carriers for hire on the public highways by means of motor trucks and automobile stages. It is insisted that the phrase "other transportation companies" must be taken to mean other like transportation companies, that is to say, other transportation companies which like railroads operate as common carriers. Section 22 of Article XII also provides that "no provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution." It must be taken as settled that this grant of authority to confer additional powers is limited (so far as applicable to the question here under consideration) to such additional powers as are cognate and germane to the regulation of railroads and other transportation companies (Pac. Telephone, Etc., Co. v. Eshleman, 166 Cal. 640; City of Pasadena v. R. R. Comm., 183 Cal. 526; City of San Bernardino v. R. R. Comm., 190 Cal. 562). The question thus presented is whether the reg-[fol. 100] ulation of the business of a private carrier engaged in the business of transporting property for hire upon the public highways between fixed termini or over a regular route is cognate and germane to the regulation of the business of a common carrier who is engaged in like transportation. We think this question must be answered in the affirmative. It is at once apparent that the private carrier is or at least may be in direct competition with the public carrier who is operating over the same route and whose business it is the duty of the commission to supervise and regulate. The primary purpose of such regulation is to secure the adequacy, regularity and reliability of service and the reasonableness of rates and charges therefor (Franchise Motor Freight Assn. v. Seavey, 69 Cal. Dec. 473, 235 Pac. 1000). To accomplish this end there must of necessity be some restriction upon competition. As was said by the Supreme Court of Washington: "The purpose of the transportation act * * * is to permit the estab-

lishment of regular and dependable service whenever public necessity and convenience requires. No adequate service can be given without proper equipment * * *. An income must be earned, which will cover operating costs and depreciation, and give some return on the investment or the service cannot be long continued. In the case of Public Utilities Commission v. Garviloch, 54 Utah, 406, 181 Pac. 272, the Supreme Court of Utah said: 'The granting of a certificate of convenience and necessity by the commission to Chandler, therefore, was in the nature of a limited franchise, which authorized him to operate his automobile stage line over the route designated in the certificate for the time and under the conditions therein specified. The certificate, therefore, not only confers the authority to operate a stage line, but it necessarily also affords him protection against any one who unlawfully interferes with the right thereby conferred. If such is not the legal effect of the certificate, then the operation of utilities may easily become detrimental rather than beneficial to the public and thus result in a farce.' " (Davis v. Nickell, 126 Wash. 421, 218 [fol. 101] Pac. 198.) If petitioners while engaged in transportation business of the kind and character described in the Auto Stage & Truck Transportation Act may exempt themselves from all of the limitations and conditions of that act by the simple device of entering into a special contract for such transportation there is no limit to the extent to which they may avail themselves of such device. If they may make one such contract they may with equal right make a dozen or a hundred. By this means they could take away from their competitor, who is operating as a common carrier under the restrictions and limitations imposed by the act, all of the most profitable and least burdensome of his business, leaving him obligated to carry the unprofitable remainder thereof, and thus disable him to render the service which the public interest requires. Transportation companies could thus secure all of the special privileges afforded to common carriers without assuming any of their duties or obligations. This would, of course, defeat in large measure the purpose not only of the Auto Stage & Truck Transportation Act, but of the constitutional provision conferring jurisdiction upon the railroad commission to regulate transportation companies. The language of this court in the case of Western Association, Etc.,

v. Railroad Commission, supra, while used in a different connection is, nevertheless, pertinent to the present consideration. It was there said: "* * * It is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of whose revenues goes by way of taxes to the support of the state." We are satisfied that the regulation of private carriers when engaged in the business of transportation described in section 1 of the Auto Stage & Truck Transportation Act is cognate and germane to the regulation of common carriers engaged in like business. This conclusion is suggested, though not decided, in the case of City of Pasadena v. R. R. Comm., supra, wherein it was said: "Considering all these circumstances, the only rea- [fol. 102] sonable conclusion is that the authority intended to be given to the legislature by this section to confer powers upon the railroad commission must be limited to the subject of powers over common carriers and transportation, and the control and regulation thereof by the commission, *and such other things as may be necessary or convenient for the proper and effectual exercise of the powers of regulation and control.*" (Italics added.)

The fact that the Auto Stage & Truck Transportation Act, in section 7 thereof, adopts by reference the procedural provisions of the Public Utilities Act does not have the effect of rendering the former act inapplicable to private carriers. The facts, for example, that section 869 of the Code of Civil Procedure, in Title 11 thereof relating to Justices Courts, adopts by reference certain provisions of Title 7 relating to Superior Courts, does not have the effect of making Justices Courts courts of record. It is conceded that the Public Utilities Act applies only to public utilities and does not of its own force apply to any private carrier, but this fact does not disable the legislature to extend its procedural provisions by subsequent legislation so as to make them applicable to other subjects.

We agree with amici curiæ for the petitioners that the Auto Stage & Truck Transportation Act does not purport to be and is not in fact a regulation of the use of the highways (Buck v. Kuykendall, 45 Sup. Ct. Rep. 324; People v. Yahne, 69 Cal. Dec. 356, 235 Pac. 50). This renders it unnecessary to discuss the various contentions of amici curiæ

based upon the hypothesis that the act might be so construed. The contentions that the act takes private property for public use without compensation in violation of section 13 of Article I of the State constitution and of section 1 of the Fourteenth Amendment to the Federal constitution, and that it violates the due process clause of the Fourteenth Amendment are based upon the predicate that the effect of the act is to transmute a private carrier into a public carrier against his will by legislative fiat. As [fol. 103] we have indicated above, our view is that the act does not and cannot have this effect. What the act does, in effect, is to make a conditional offer of a special privilege. The offeree is not entitled to this privilege as a matter of right and therefore in order to obtain it he must submit to the conditions attached to the offer. He is not compelled to submit to these conditions, but if he does not do so he cannot avail himself of the privilege. If he does avail himself of the privilege under these circumstances he is deemed to have thereby consented to the condition. An analogous situation is presented by the provisions of Article I, section 14 of our constitution which provides that the taking of private property for a logging or lumbering railroad "shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier." This is simply an offer of a special privilege to an offeree who is not otherwise entitled to it upon condition that he return the quid pro quo specified therein. If the owner of a private logging railroad should avail himself of this offered privilege by exercising the right of eminent domain, it cannot be seriously doubted that he would thereby become a public carrier. In such case it could not be said that his property had been taken for public use without compensation, but rather it should be said that he had voluntarily dedicated it to the public use, or quasi public use, of common carriage, and that his compensation therefor was the special privilege which he obtained thereby and to which he was not otherwise entitled. Having voluntarily elected to accept this privilege as compensation, he would not be heard thereafter to assert that it was not adequate compensation. By the Auto Stage & Truck Transportation Act the state offers the special privilege of using the public

highways for the transaction of private business, a privilege to which no one is entitled as of right. But the offer is conditional that the offeree shall return a considera-
[fols. 104 & 104a] tion therefor by dedicating his property to the quasi public use of public transportation or, at least, by submitting himself to the conditions, regulations and restrictions specified in the act. The offeree is not compelled to submit himself to these conditions, regulations and restrictions, but if he does not he is not entitled to the privilege offered. If he does avail himself of the offered privilege he must be deemed to have accepted the conditions of the offer.

The demurrer to the petition is sustained and the order to show cause is discharged.

Myers, C. J.

We Concur: Richards, J.; Lawlor, J.; Seawell, J.; Waste, J.; Knight, J., pro Tem.; Lennon, J.

[fols. 105-148] Petition for rehearing, covering 42 pages, filed October 20, 1925, omitted from this print. It was denied and nothing more by order October 29, 1925.

[fols. 149-163] Reply to petition for rehearing covering 15 pages, filed October 28, 1925, omitted from this print.

[fols. 164 & 164a] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed October 31, 1925

By the COURT:

Rehearing denied October 29, 1925.
Shenk, J. dissenting.

Lawlor, J., Acting C. J.

[fol. 165] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed November 19, 1925

To the Honorable Louis W. Myers, Chief Justice of the Supreme Court of the State of California:

Come now Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, and would show that in the record and proceedings and rendition of the judgment and decree against them by the Supreme Court of the State of California in the above entitled cause, said Court being the highest Court of the said State of California in which a decision in the above entitled action could be had, manifest error occurred, as will more fully appear from the Assignment of Errors exhibited herewith, greatly to the damage of petitioners, whereby they feel aggrieved.

That in the record and proceedings, it will appear that there was drawn in question the validity of a statute of the State of California on the ground of its being repugnant to the Constitution of the United States and the decision of said Supreme Court of the State of California is in favor of the validity of said statute of said State of California.

Wherefore, petitioners pray that a Writ of Error may issue and that they may be allowed to bring up for review, [fols. 166 & 166a] before the Supreme Court of the United States, the judgment and decree of said Supreme Court of the State of California, in the above entitled cause.

Leonard, Surr & Hellyer, Thelen & Marrin, Sanborn Roehl & Smith, Devlin & Brookman, Attorneys for Petitioners.

IN SUPREME COURT OF CALIFORNIA

ORDER ALLOWING WRIT OF ERROR

Upon reading the foregoing petition of Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company,

in the above entitled cause, and it appearing that bond has been waived,

It is ordered that a Writ of Error issue without the filing of a bond.

Dated at San Francisco, California, this 18th day of November, 1925.

Myers, Chief Justice of the Supreme Court of the State of California.

The filing of a bond or other security for costs is hereby waived.

Dated San Francisco, California, November 18th, 1925.

Carl I. Wheat, Woodward M. Taylor, Attorneys for Railroad Commission of the State of California.

[fol. 167] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed November 19, 1925

Now come Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, the petitioners in the above entitled cause, and respectfully aver that there are errors in the records, proceedings and judgment in said cause in the Supreme Court of the State of California, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignment of errors:

I

The Supreme Court of the State of California erred in holding and deciding that the statute of the State of California known as the Auto Stage and Truck Transportation Act (Statutes of California of 1917, p. 330, as amended by Statutes of California of 1919, p. 457) is not repugnant to the provisions of the Constitution of the United States and particularly to Section 1 of Article XIV of the Amendments thereof, in that in and by said Statute the State of

California seeks to take the private property of petitioners for public use without just compensation and to deprive petitioners of their property without due process of law.

[fol. 168] II

Said Court erred in holding and deciding that the transportation by petitioners of citrus fruits over the highways of the State of California as a private carrier under private contract could be validly prohibited by the State of California and that said Auto Stage and Truck Transportation Act prohibiting such transportation does not thereby violate the provisions of Section 1 of Article XIV of the Amendments of the Constitution of the United States, in that in and by said statute the State of California seeks to take the private property of petitioners for public use without just compensation and to deprive petitioners of their property without due process of law.

III

Said Court erred in holding and deciding that the State of California may validly convert the private property of petitioners, used exclusively in the business of a private carrier, into public carrier property by compelling petitioners, as a condition to carrying private property by private contract over the highways of the State of California, to subject themselves to the jurisdiction of the Railroad Commission of the State of California, dedicate their property to public use and become common carriers, and in holding and deciding that said Auto Stage and Truck Transportation Act, which compels petitioners to so convert their property into a public utility, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in so far as said Section provides that no State shall take the private property of any person for public use without just compensation or deprive any person of property without due process of law.

[fol. 169] IV

Said Court erred in holding and deciding that said Auto Stage and Truck Transportation Act is not repugnant to

Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by said Statute the State of California seeks to deny to petitioners the equal protection of the laws.

V

Said Court erred in holding and deciding that Sections 22 and 23 of Article XII of the Constitution of the State of California purporting to authorize the Legislature of California to vest in the Railroad Commission of the State of California power and authority to prohibit the carriage of goods over the highways of said State by private carriers under private contract and to compel all persons carrying over the highways under private contract to submit to the jurisdiction of said Railroad Commission and to dedicate their property to public use as a condition to carrying on said private business are not repugnant to the Constitution of the United States and particularly to Section 1 of Article XIV of the Amendments thereof, in that said Sections of the Constitution of California seek to take the private property of the petitioners for public use without just compensation and deprive these petitioners of their property without due process of law and deny to them the equal protection of the laws.

VI

Said Court erred in holding and deciding that the order of said Railroad Commission of the State of California, made on August 20, 1924, directing petitioners to cease hauling citrus fruits over the highways of the State of California pursuant to their contract with the Redlands Orange Growers Association, was valid and not repugnant [fol. 170] to Section 1 of Article XIV of the Constitution of the United States in that in and by said order the State of California seeks to take the private property of petitioners for public use without just compensation and to deprive these petitioners of their property without due process of law and also to deny to these petitioners the equal protection of the laws.

For the errors aforesaid, petitioners pray that the final judgment of the Supreme Court of the State of California

in said cause be reversed, and a judgment rendered in favor of said petitioners and for costs.

Dated at San Francisco, California, this 18th day of November, 1925.

Leonard, Surr & Hellyer, Thelen & Marrin, Sanborn, Raehl & Smith, Devlin & Brookman, Attorneys for Petitioners.

[fol. 170a] [File endorsement omitted]

[fol. 171] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

WRIT OF ERROR—Filed November 19, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings as well as in the rendition of the judgment which is in the Supreme Court of the State of California before you, being the highest Court of said State in which a decision in the suit could be had, in a suit between Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, petitioners, and the Railroad Commission of the State of California, respondent, decided by you on the 1st day of October, 1925, and wherein was drawn in question the validity of a statute of the State of California on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of the validity of said statute, a manifest error has happened to the great damage of said petitioners as by the Petition for Writ of Error, the Assignment of Errors and the record in said matter fully appears;

And we being willing that error, if any hath occurred, [fol. 172] should be duly corrected and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record,

proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, and that you have the same in the said Supreme Court at Washington, D. C., within sixty (60) days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 19th day of November, in the year of our Lord one thousand nine hundred and twenty-five.

Walter B. Maling, Clerk of the United States District Court, Southern Division, Northern District of California. (Seal of the U. S. District Court, Northern District of California.)

Allowed on November 19, 1925. Myers, Chief Justice of the Supreme Court of the State of California.

[fol. 172a] [File endorsement omitted.]

[fols. 173-174a] Citation, in usual form, showing service on Carl I. Wheat and Woodward M. Taylor, filed November 19, 1925; omitted in printing.

[fol. 175] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated by and between the parties to this proceeding that the documents hereinafter tabulated shall constitute the full and complete record on review to be returned to the Supreme Court of the United States by the Supreme Court of the State of California in the event that a Writ of Error issue to review the decision of the Supreme Court of the State of California made in this proceeding on the 1st day of October, 1925:

1. Petition of Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, to the Supreme Court of the State of California for Writ of Review, filed December 12, 1924, including the following exhibits:

A. Complaint of A. J. Happe vs. Redlands Orange Growers Association, et al., filed with the Railroad Commission of the State of California.

B. Answer of Wesley H. Frost.

[fol. 176] C. Opinion and Order of the Railroad Commission of California, dated August 20, 1924.

D. Copy of lease of December 14, 1923, between M. L. Frost and W. H. Frost, co-partners, and Redlands Orange Growers Association.

E. Application of Marion L. Frost and Wesley H. Frost, co-partners doing business under the firm name of Frost & Frost Trucking Company, to the Railroad Commission for a rehearing.

F. Order of the Railroad Commission made on September 13, 1924, granting rehearing.

G. Order of the Railroad Commission made on November 12, 1924, affirming prior order.

Points and Authorities

2. Demurrer of Railroad Commission of California to Petition for Writ of Review, with attached Points and Authorities.

3. Order to Show Cause issued by the Supreme Court of California on January 12, 1925.

4. Decision of the Supreme Court of California filed on October 1, 1925.

5. Petition of Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, for rehearing.

6. Reply of Railroad Commission of the State of California to Petition for Rehearing.

7. Decision of the Supreme Court of the State of California, made on October 29, 1925, denying petition for rehearing.

8. Petition to Supreme Court of California for Writ of Error, Order Allowing Writ of Error, Waiver of Appeal Bond, Assignment of Errors, Writ of Error, Citation and [fols. 177 & 177a] Service, Stipulation as to Record and Clerk's Certificate.

Dated at San Francisco, California, this 24th day of November, 1925.

Leonard, Surr & Hellyer, Thelen & Marrin, Sanborn & Roche & De Lancey C. Smith, Devlin & Brookman, Attorneys for Petitioners. Carl I. Wheat, Woodward M. Taylor, Attorneys for Respondent.

[fol. 178] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

CLERK'S CERTIFICATE

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing documents, to-wit: complaint of A. J. Happe before the Railroad Commission of the State of California, answer of Wesley H. Frost, opinion and order of the Railroad Commission of California made on August 20, 1924, copy of lease of December 14, 1923, between M. L .Frost and W. H. Frost, co-partners, and Redlands Orange Growers' Association, application of Marion L. Frost and Wesley H. Frost, co-partners doing business under the firm name of Frost & Frost Trucking Company, to the Railroad Commission for a rehearing, order of the Railroad Commission made on September 13, 1924, granting rehearing, order of the Railroad Commission made on November 12, 1924, affirming prior order, petition of Marion L. Frost and Wesley H. Frost, co-partners, to the Supreme Court of California for writ of review, with points and authorities, demurrer of the Railroad Commission of California to petition for writ of review with attached points and authorities, order to

show cause issued by the Supreme Court of California on January 12, 1925, decision of the Supreme Court of Cali-
[fol. 179] fornia filed on October 1, 1925, petition of Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company, for rehearing, reply of Railroad Commission of the State of California to petition for rehearing, decision of the Supreme Court of California made on October 29, 1925, denying petition for rehearing, petition to Supreme Court of California for writ of error, order allowing writ of error, waiver of appeal bond, assignment of errors, writ of error, citation and service, stipulation as to record and Clerk's certificate, constitute the full and complete transcript of the record and proceedings in the case of Marion L. Frost and Wesley H. Frost, co-partners doing business under the name and style of Frost & Frost Trucking Company v. Railroad Commission of the State of California, and also of the opinions of the Railroad Commission of California and the Supreme Court of the State of California rendered therein.

In witness whereof, I have hereunto affixed my hand and affixed the seal of said Supreme Court of the State of California in my office at San Francisco, California, this 27th day of November, 1925.

B. Grant Taylor, Clerk of the Supreme Court of the State of California. (Seal Supreme Court of California.)

[fol. 180] In Supreme Court of the United States

Statement by Plaintiffs in Error of Points to be Relied Upon and Designation of Parts of the Record to be Printed, with Consent of Defendant in Error Thereto Filed—December 3, 1925

Plaintiffs in Error in the above entitled proceeding intend to rely therein on each point set forth in their Assignment of Errors herein and they herewith specify the entire

record herein as necessary for the consideration of said points.

Max Thelen, H. H. Sanborn, De Lancey C. Smith, Frank R. Devlin, Douglas Brookman, Thelen & Marrin, Sanborn, Roche & Smith, Leonard, Surr & Hellyer, Devlin & Brookman, Attorneys for Plaintiffs in Error.

Plaintiffs in Error having specified the entire record as necessary, in their opinion, for the consideration of the points on which they intend to rely, Defendant in Error hereby consents that the Clerk of the Supreme Court of the [fols. 181 & 182] United States may proceed at once with the printing of the record.

Carl T. Wheat, Woodward M. Taylor, Attorneys for Defendant in Error.

[fol. 183] [Endorsed:] File No. 31,551. Supreme Court U. S., October Term, 1925. Term No. 828. Marion L. Frost et al., etc., Plaintiffs in Error, vs. Railroad Commission of the State of California. Statement by plaintiffs in error of points to be relied upon and designation of parts of the record to be printed; with consent of defendant in error thereto. Filed December 3rd, 1925.

Endorsed on cover: File No. 31,551. California Supreme Court. Term No. 828. Marion L. Frost and Wesley H. Frost, copartners, doing business under the name and style of Frost & Frost Trucking Company, plaintiffs in error, vs. Railroad Commission of the State of California. Filed December 3rd, 1925. File No. 31,551.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 828

MARION L. FROST and WESLEY H. FROST, co-partners,
Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

MAX THELEN,
H. H. SANBORN,
DELANCEY C. SMITH,
FRANK R. DEVLIN,
DOUGLAS BROOKMAN,
San Francisco, California.
Attorneys for Plaintiffs in Error.

LEONARD, SURR & HELLYER,
THELEN & MARRIN,
SANBORN & ROEHL and DELANCEY C. SMITH,
DEVLIN & BROOKMAN,
EDWIN C. BLANCHARD,
Of Counsel.

Parker Printing Company, 521 Clay Street, San Francisco

Index

Table of Cases and Statutes

APPENDIX.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 828

MARION L. FROST and WESLEY H. FROST, co-partners,
Plaintiffs in Error,
vs.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

OFFICIAL REPORT OF OPINION OF COURT BELOW.

The official report of the opinion delivered in the Supreme Court of California is *Frost v. Railroad Commission of California,* L. A. No. 8473, decided October 1, 1925, Vol. 70, California Decisions, p. 457, 240 Pac. 26.

The official report of the opinion of the Supreme Court of California in *Holmes v. Railroad Commission of California,* S. F. No. 11,467, decided December

23, 1925, which opinion is set forth in full in the appendix to this brief, is Vol. 70, California Decisions, p. 752, 242 Pac. 486.

GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED.

(1) The date of the judgment to be reviewed is October 1, 1925 (R. 74-87).

(2) The claims advanced in the lower court which are relied upon as the basis of this Court's jurisdiction were that the Auto Stage and Truck Transportation Act of California (Ch. 213, St. 1917, as amended) and Article XII of the Constitution of California (insofar as said article was held to authorize the enactment of what we claim to be the unconstitutional portions of said Act) and the decision of the Railroad Commission of California purported to be rendered under said Act and said article of the Constitution of California, are invalid on the ground of being repugnant to the Fourteenth Amendment to the Constitution of the United States (R. 3, 24-26, 43-46, 46, 47-50).

The ruling made was that said California statute, constitutional provisions and Railroad Commission's decision are valid and do not violate the Fourteenth Amendment to the Constitution of the United States (R. 74, 80-82, 86-7).

(3) The jurisdiction of this Court is invoked under the Act of February 13, 1925, effective May 13, 1925, 43 Stat. 937, entitled "An Act to amend

the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes", and particularly under Section 237 (a) of the Judicial Code, as thus amended, providing in part that

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

STATEMENT OF CASE.

I.

THE ISSUE.

The issue in this case, as correctly stated by the Supreme Court of California in the decision herein under review, is

> "whether one who is engaged as a business in the transportation of property by auto truck for compensation over the public highways of the state between fixed termini and over a regular route, *but operating solely under a private contract,* is subject to the provisions of the Auto Stage and Truck Transportation Act (of California) as amended." (R. 75.)

Plaintiffs in error are admittedly a *private* carrier and *not* a *common carrier.* When they were forced by the order of the California Railroad Commission to cease their operations, they were carrying only for

Redlands Orange Growers' Association under a *single private* contract.

The question is whether an auto truck operator desiring to conduct his business under a single *private* contract can constitutionally have his right to operate conditioned on first securing from the Railroad Commission a certificate declaring that the *public* convenience and necessity require his operation under a statute by which he will thereafter be regulated in all respects as a common carrier.

(Note: Throughout this brief, italics, unless otherwise stated, are ours.)

II.

PROCEEDINGS BEFORE RAILROAD COMMISSION OF CALIFORNIA.

1. Complaint.

On February 5, 1924, one A. J. Happe, a certificated motor truck operator doing business under the fictitious name of A. J. Happe Transfer Company, filed with the California Railroad Commission his formal complaint alleging that these plaintiffs in error and others were engaged in the transportation of citrus fruits between packing houses in the Redlands-Highlands district in California and the City of Los Angeles and Los Angeles Harbor points (R. 4-5).

The complaint alleged that this transportation was in violation of the Auto Stage and Truck Transpor-

tation Act of California for the reason that the defendants had not secured from the Railroad Commission certificates declaring that the *public* convenience and necessity *required* their operations. The Commission was asked to make its order requiring the defendants to desist forthwith from their operations (R. 6-9).

2. Answers.

The defendants thereupon filed their answers denying all the material allegations of the complaint and expressly denying that the Railroad Commission had any jurisdiction over the subject matter of the complaint or over the defendants or any of them. (R. 9-11).

3. Decision.

On August 20, 1924, the Railroad Commission rendered its decision holding that while these plaintiffs in error were, in fact, *private* and not *common* carriers, they were nevertheless subject to the provisions of the Auto Stage and Truck Transportation Act (R. 12-21).

The Commission made its order directing these plaintiffs in error to desist from transportation under their contract with Redlands Orange Growers' Association unless and until they should first have secured from the Commission a certificate that the *public* convenience and necessity required the resumption or continuance of the transportation (R. 20).

The Commission's secretary was directed to forward to the District Attorney (the officer in California who is responsible, in his county, for the prosecution of violations of State laws) a certified copy of the decision (R. 21).

4. Rehearing.

These plaintiffs in error thereupon filed with the Railroad Commission their application for a rehearing, in which they set forth the various Federal constitutional questions (R. 24-26) but after holding a rehearing the Commission on November 12, 1924, made its order affirming its prior decision (R. 27-8).

III.

PROCEEDINGS BEFORE THE SUPREME COURT OF CALIFORNIA.

1. Petition for Writ of Review.

Plaintiffs in error thereafter filed with the Supreme Court of California their petition for a writ of review, as provided by Section 67 of the Public Utilities Act of California (Ch. 91, St. 1915) to review the Railroad Commission's decision (R. 1-4).

The Railroad Commission filed its demurrer to the petition (R. 51-2).

2. Decision of Supreme Court of California.

The Supreme Court of California thereafter rendered its decision holding that these plaintiffs in error,

notwithstanding their status as *private* carriers, under a single *private* contract, were nevertheless subject to the provisions of the Auto Stage and Truck Transportation Act (R. 74-87).

3. Petition for Rehearing.

These plaintiffs in error thereupon filed with the California Supreme Court their petition for rehearing, in which the Federal constitutional questions herein presented, as well as other questions relating to the rights of these plaintiffs in error under the Constitution of California and the Auto Stage and Truck Transportation Act, were fully presented (R. 87).

Thereafter, on October 29, 1925, the Supreme Court denied a rehearing, Judge Shenk dissenting (R. 87).

From said decision of the Supreme Court of California, this writ of error is prosecuted.

> (Note: On December 23, 1925, the Supreme Court of California rendered its decision in the case of *Holmes v. Railroad Commission,* 70 Cal. Dec. 752, 242 Pac. 486, in which decision the Court reviews and affirms its decision in the *Frost* case. In order that this Court may have fully before it the views of the California Supreme Court, we reproduce a copy of the *Holmes* decision in the appendix to this brief.
>
> We invite particular attention to the strong dissenting opinion of Judge Shenk, who was away and hence could not participate in the original decision in the *Frost* case.)

SPECIFICATION OF ERRORS.

The following is a specification of the assigned errors which are intended to be urged:

I.

The Supreme Court of the State of California erred in holding and deciding that the statute of the State of California known as the Auto Stage and Truck Transportation Act (Statutes of California of 1917, p. 330, as amended by Statutes of California of 1919, p. 457) is not repugnant to the provisions of the Constitution of the United States and particularly to Section 1 of Article XIV of the Amendments thereof, in that in and by said Statute the State of California seeks to take the private property of plaintiffs in error for public use without just compensation and to deprive plaintiffs in error of their property without due process of law.

II.

Said Court erred in holding and deciding that the transportation by plaintiffs in error of citrus fruits over the higways of the State of California as a private carrier under private contract could be validly prohibited by the State of California and that said Auto Stage and Truck Transportation Act prohibiting such transportation does not thereby violate the provisions of Section 1 of Article XIV of the Amendments of the Constitution of the United States, in that in and by said statute the State of California seeks to take the private property of plaintiffs in error for

public use without just compensation and to deprive plaintiffs in error of their property without due process of law.

III.

Said Court erred in holding and deciding that the State of California may validly convert the private property of plaintiffs in error, used exclusively in the business of a private carrier, into public carrier property by compelling plaintiffs in error, as a condition to carrying private property by private contract over the highways of the State of California, to subject themselves to the jurisdiction of the Railroad Commission of the State of California, dedicate their property to public use and become common carriers, and in holding and deciding that said Auto Stage and Truck Transportation Act, which compels plaintiffs in error to so convert their property into a public utility, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in so far as said Section provides that no State shall take the private property of any person for public use without just compensation or deprive any person of property without due process of law.

IV.

Said Court erred in holding and deciding that said Auto Stage and Truck Transportation Act is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by said Statute the State of California

seeks to deny to plaintiffs in error the equal protection of the laws.

V.

Said Court erred in holding and deciding that Sections 22 and 23 of Article XII of the Constitution of the State of California purporting to authorize the Legislature of California to vest in the Railroad Commission of the State of California power and authority to prohibit the carriage of goods over the highways of said State by private carriers under private contract and to compel all persons carrying over the highways under private contract to submit to the jurisdiction of said Railroad Commission and to dedicate their property to public use as a condition to carrying on said private business are not repugnant to the Constitution of the United States and particularly to Section 1 of Article XIV of the Amendments thereof, in that said Sections of the Constitution of California seek to take the private property of these plaintiffs in error for public use without just compensation and deprive these plaintiffs in error of their property without due process of law and deny to them the equal protection of the laws.

VI.

Said Court erred in holding and deciding that the order of said Railroad Commission of the State of California, made on August 20, 1924, directing plaintiffs in error to cease hauling citrus fruits over the highways of the State of California pursuant to their contract with the Redlands Orange Growers' Asso-

ciation, was valid and not repugnant to Section 1 of Article XIV of the Constitution of the United States in that in and by said order the State of California seeks to take the private property of plaintiffs in error for public use without just compensation and to deprive these plaintiffs in error of their property without due process of law and also to deny to these plaintiffs in error the equal protection of the laws.

ARGUMENT.

I.

SUMMARY.

For a summary of our argument on the Facts and the Law, reference is respectfully made to the Index, in which the subjects considered are quite fully set forth in summary form.

II.

THE FACTS.

> "There is no dispute as to any of the facts herein. All of the essential facts are conceded to be correctly set forth in the allegations of the petition and the exhibits attached thereto." (From decision of Supreme Court of California, R. 75.)

The petition of these plaintiffs in error to the California Supreme Court for a writ of review alleged in part (Par. XI) as follows:

> "Petitioners aver that the evidence adduced before said Commission, at said hearing in said

matter, affirmatively showed, without conflict, that the trucks owned and controlled by petitioners were used solely in transporting over the public highways the fruit and property owned by Redlands Orange Growers Association, under the said contract between it and these petitioners, dated December 14, 1923; and there was no evidence adduced before said Commission, at said hearing, or otherwise, that these petitioners owned or controlled, or operated, or managed any automobile, jitney bus, auto truck, stage or auto stage, for any purpose whatsoever, or over any public highway whatsoever, other than said trucks and said operations for transporting said property owned by said Redlands Orange Growers Association, pursuant to and under said contract dated December 14th, 1923." (R. 3.)

The Railroad Commission's demurrer conceded the accuracy and correctness of these allegations (R. 51-2).

Stated in a nut-shell, the conceded facts are as follows:

Plaintiffs in error were engaged in the transportation of citrus fruits by motor truck for Redlands Orange Growers' Association, under a single private contract over the public highway between Redlands and the harbor of Los Angeles, California. Plaintiffs in error hauled only for said Association under said contract and for no one else. Plaintiffs in error were not a *common* carrier. They were operating solely as a *private* carrier under said single *private* contract.

The question on these facts is:

Can the State of California, consistently with the protecting provisions of the Fourteenth Amendment

to the Constitution of the United States, lawfully provide that these plaintiffs in error cannot operate under their single *private* contract unless they first secure from the Railroad Commission a certificate declaring that *public* convenience and necessity *require* their operation under a statute providing that plaintiffs in error must thereafter submit themselves to regulation in all respects as *common* carriers?

III.

THE LAW.

We shall now present our argument and the authorities in support thereof, under two main points, as follows:

(1) The California Auto Stage and Truck Transportation Act takes the private property of these plaintiffs in error for public use without just compensation and deprives them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(2) The California Auto Stage and Truck Transportation Act denies to these plaintiffs in error the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Whenever in this brief we make the above points with reference to the California Auto Stage and

Truck Transportation Act, we intend to include also and to make the same points with reference to the Railroad Commission's decision in this case as well as with reference to Article XII of the Constitution of California, in so far as said article was held in the *Frost* decision to authorize the enactment of what we claim to be the unconstitutional portions of the Auto Stage and Truck Transportation Act (R. 82-85).

Before developing the above two points, we believe that it would be helpful to make a careful analysis of the Auto Stage and Truck Transportation Act. We believe that the decision in this case will be much facilitated by a proper analysis and understanding of that statute.

A.

Analysis of Auto Stage and Truck Transportation Act.

For the convenience of the Court, a copy of the Auto Stage and Truck Transportation Act, as originally enacted in 1917 (Ch. 213, St. 1917, p. 330), with the subsequent amendments thereto, is reproduced in the appendix hereto.

1. The Obligations of the Act are those of Common Carriage.

Before the Supreme Court of California, a sharp difference of opinion arose between these plaintiffs in error and the Railroad Commission with reference to the effect of this Act. These plaintiffs in error urged

> "that this act in its application to private carriers has the effect of transforming them into public carriers by legislative fiat". (R. 76.)

The Supreme Court of California decided this issue in favor of these plaintiffs in error and held that

> "it cannot be denied that the provisions of the act as applied to private carriers do closely approximate this result (i. e. the result contended for by these plaintiffs in error)." (R. 76.)

In reaching this conclusion, the Court made an analysis of the Act and of certain provisions of the Constitution of California, which analysis we now adopt as our own. The following passages in quotations are the language of the Supreme Court. The notes contain some additional comments from us.

Section 1.

"Section 1 of the Act defines the term 'transportation company' as used therein to include every person 'operating * * * any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation over any public highway in this state between fixed termini or over a regular route * * * '." (R. 75-6.)

Section 2.

"Section 2 provides that no transportation company may operate 'except in accordance with the provisions of this act'." (R. 76.)

Section 3.

(Note: The Court here refers to Section 3 of the original Act, which section was repealed in 1919.) (Ch. 280, St. 1919, p. 457.)

Section 4.

"Section 4 empowers the Railroad Commission to supervise and regulate every such transportation company, to fix its rates, fares, charges, classifications, rules and regulations, to regulate its accounts, service and safety of operations, to require the filing of annual and other reports and to supervise and regulate transportation companies 'in all other matters affecting the relationship between such companies and the traveling and shipping public'." (R. 77.)

(Note: In other words, every carrier to whom the Act applies, including *private* carriers, is compelled to submit to regulation by the Railroad Commission of his

Rates, fares, charges and classifications;
Rules and regulations;
Accounts;
Service;
Safety of operations; and
Annual and other reports.

To make sure that nothing affecting the relationship between the carrier and the traveling and shipping public be omitted, the Railroad Commission is given further omnibus power—

"to supervise and regulate transportation companies in *all other matters* affecting the relationship between such companies and the *traveling and shipping public*".

A truck operator who intends and desires to operate only as a *private* carrier under a single private contract is to be forced to submit to regulation in all respects as a *common* carrier. He is to be prevented from entering into a relation only with his single private customer and is to be forced into a relation with the entire traveling and shipping public. His rights and obligations are to be *public* and not *private*.)

Section 5.

"Section 5 forbids operation even under a franchise or permit granted by any incorporated city or town, city and county, or county, without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require the exercise of such right or privilege, and provides further that the Commission may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the *public* convenience and necessity may require." (R. 77.)

(Note: The *private* operator is not to be permitted to run his truck until he has first secured from the Railroad Commission a certificate declaring that the *public* convenience and necessity require his operation. The status of the private operator is to be transmuted from a relation under a *private* contract with a *private* customer into a relation with the *public*, dependent upon the *public* convenience and necessity.

The Court might also have pointed out that under Section 5 the rights and privileges of any private operator who has secured a cer-

tificate of public convenience and necessity cannot be *sold,* or *assigned,* or *leased,* or *transferred* without the consent of the Railroad Commission first secured. Also, the rights of such operators cannot even be *inherited* by their wives or children or other heirs unless first authorized by the Commission. These provisions show how completely the status of such operators is to be transferred from that of intending private carriers into forced common carriers.)

Section 6.

"Section 6 forbids the issuance of any stock, stock certificate or bond by such transportation company except pursuant to an order first secured from the Railroad Commission." (R. 77.)

(Note: In California, *private* corporations desiring to issue securities must secure the permission of the Commissioner of Corporations (Ch. 532, St. 1917, as amended), and not the Railroad Commission. *Public* utilities must secure the consent of the Railroad Commission. (Public Utilities Act, as re-enacted, Ch. 91, St. 1915, Sec. 52.) Nevertheless, this particular kind of private corporation is to go to the Railroad Commission and not the Corporation Commissioner to secure permission to issue its securities.

The Court might have added that the fees in connection with such issues are to be paid into the Railroad Commission Fund for the support of the Railroad Commission in the regulation and supervision of public utilities.)

Section 6a.

(Note: This section provides that every transportation company must furnish to the

Railroad Commission reports answering all questions on which the Commission may desire information.)

Section 7.

"Section 7 provides that as to applications and complaints and procedure subsequent thereto all transportation companies will be subject to regulation by the Commission 'under the conditions and subject to the limitations and with the effect specified in the public utilities act'." (R. 77.)

(Note: The very first condition and limitation specified in Sections 60 and 61a of the Public Utilities Act of California (Ch. 91, St. 1915, Secs. 60 and 61a) referring to formal complaints before the Railroad Commission, is that the complaints filed must be with reference to "any act or thing done or omitted to be done *by any public utility*".

In *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, 578, the Supreme Court of California, referring to this matter, said:

> "By specific reference to the Public Utilities Act, the Commission is given power (by Section 7 of the Auto Stage and Truck Transportation Act) to hear and determine complaints against transportation companies in exactly the same manner and to the same *extent* as it has of complaints against *other* public utilities.")

Section 8.

"Section 8 makes the violation of any of the provisions of the Act or of any order, decision, rule,

regulation or direction of the Commission a misdemeanor and prescribes the punishment therefor." (R. 77.)

Constitution of California.

Art. XII, Secs. 20, 21, and 22.

"Furthermore, if the legislature is competent to thus define 'transportation companies' to include private carriers, it follows that they cannot raise any charge or rate without first securing the consent of the Railroad Commission. (Const. Art. XII, Sec. 20), cannot accord to one person any rate or facility different from that accorded to any other person (Const. Art. XII, Sec. 21), and cannot render a transportation service for any rate or charge less than that named in the tariff rates established by the Commission (Const. Art. XII, Sec. 22)." (R. 67.)

In concluding its analysis of the Auto Stage and Truck Transportation Act and the applicable provisions of the Constitution of California on this point, the Supreme Court of California in the following language very properly emphasizes its conclusion with reference to the *public* or *common carrier* disabilities and limitations of a *private* carrier who might find himself subject to the provisions of the Auto Stage and Truck Transportation Act:

> "A carrier who files with the Railroad Commission a schedule of his routes, tariffs and charges, who is under compulsion to render transportation service of the kind, character and quality prescribed by the Commission, who is

> disabled to enter into a contract for the rendition of transportation service of any kind, quality or character different from that prescribed, or for a rate of compensation either greater or less than the prescribed rate, *is at least subjected to the disabilities and limitations* which circumscribe a public or common carrier. (10 *C. J.* 37, et seq.)" (R. 77-8.)

In a later portion of its decision, the Supreme Court of California found—erroneously, as we shall hereinafter undertake to show,—that a truck owner who desires to operate as a *private* carrier under a *private* contract *can* be *forced,* as a *condition,* to his proposed use of the public highways, to a compliance with the Auto Stage and Truck Transportation Act and all its provisions which so unmistakably speak the language of common carrier and public utility regulation and control.

At this point, however, we desire to emphasize the fact that the analysis of the statute made by the highest court of California unmistakably and conclusively shows that any *private* carrier who is forced to submit to the Auto Stage and Truck Transportation Act will be compelled to submit to all the obligations, burdens, disabilities, restrictions and limitations which characterize the service of a *public* or *common* carrier.

The effect of the statute is to force such *private* carrier into the status of a *common* carrier.

The Supreme Court of California frankly conceded this conclusion and we see no escape from it.

2. The Act does not purport to be and is not, in fact, a regulation of the use of the highways.

The principal argument of the respondent Railroad Commission, in seeking to sustain the Auto Stage and Truck Transportation Act before the Supreme Court of California, was that the Act is a regulation of the *use* of the *highways*. Many authorities establishing this power on the part of the State were cited.

The simple, and to our mind conclusive, answer to this contention is that the Act does not purport to be and is not, in fact, a regulation of the use of the highways.

The *title* of the Act contains no reference to the construction, maintenance, repair or use of any highway. As amended in 1919 (St. 1919, pp. 457, 458) the title relates solely to the "supervision and regulation" of *transportation companies* and their transportation by the Railroad Commission.

The Act itself contains no reference whatsoever to the construction, maintenance, repair or use of any highway.

The purpose of the Act is not to determine the manner of the use of any highway but rather to *regulate* the *business* of certain persons by whom the highways are used.

The Act contains none of the earmarks of the usual and lawful statutes regulating the use of the highways, but shows clearly and distinctly that it is an act modeled on the Public Utilities Act of California providing for the regulation of those who are engaged

in certain classes of business which are generally termed "public utilities".

The distinction which we have just pointed out was very clearly made by this Court in *Buck v. Kuykendall*, 267 U. S. 307. This Court was there construing a statute of the State of Washington which followed the lines of the Act here under consideration and was modeled thereon.

After stating that appropriate state regulations adopted primarily to promote *safety* upon the highways and *conservation* in their *use* are not obnoxious to the commerce clause of the Federal Constitution, where the indirect burden imposed upon interstate commerce is not unreasonable, this Court proceeds as follows:

> "The provision here in question is of a different character. *Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.*"

This Court then continues:

> "*It determines not the manner of use, but the persons by whom the highways may be used.* It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."

Most, if not all, of the states now have statutes clearly valid, providing for the regulation of the use of the highways by motor vehicles in matters such as the following:

(1) The registration of motor vehicles;

(2) The issuance of licenses to operators and chauffeurs;

(3) Registration and license fees;

(4) The construction and equipment of motor vehicles, including their width, the maximum weight of their loads, their gross weight in relation to the width of the tires, tire equipment, trailers, brakes, mirrors, windshields and lights; and

(5) The manner of operating the vehicles.

The statutes are applied uniformly to all motor vehicles using the public highways.

The California Motor Vehicle Act (Ch. 266, St. 1923) is such an act.

But the Auto Stage and Truck Transportation Act contains none of these provisions. It does not undertake to regulate in any respect the construction, maintenance, repair or use of any highway.

The decisions frequently refer to the fact that statutes which actually regulate the use of the highways, provide for the payment of *fees* which are used for the construction, maintenance or repair of the highways. The California Motor Vehicle Act (Sections 159-160) contains such provisions.

Thus in *Buck v. Kuykendall,* supra, this Court said:

> "It (the State) may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtain a compensation for the use of the road facilities provided. *Hendrick v. Maryland,* 235 U. S. 610."

In this respect, also, the contrast between a statute which actually regulates the use of the highways and the Auto Stage and Truck Transportation Act is significant. Under Section 5 of this Act (St. 1923, Ch. 310) a fee of $50.00 must be paid to the Railroad Commission in connection with each application for a certificate of public convenience and necessity or for an order authorizing the assignment of an existing operative right. Under Section 6, fees must be paid to the Railroad Commission in connection with each application for authority to issue securities (see also Public Utilities Act, Section 52). *Not one penny of these fees may be used for the construction, maintenance or repair of any highway.* These fees are all paid into the Railroad Commission fund (Public Utilities Act, Sections 57 and 85) and used in support of the Railroad Commission's work in the supervision and regulation of public utilities.

We cannot escape the conclusion that the Act was never intended to be and, in fact, is not a statute regulating the use of any highway.

The Supreme Court of California decided this issue, also, in favor of the contention of these plaintiffs in error and contrary to the position of the respondents, as follows:

> "We agree with amici curiae for the petitioners that the Auto Stage and Truck Transportation Act does not purport to be and is not in fact a regulation of the use of the highways. (*Buck v. Kuykendall,* 45 Sup. Ct. Rep. 324; *People v. Yahne,* 69 Cal. Dec. 356, 235 Pac. 50.)" (R. 85.)

We have, then, a statute which the highest court of the state declares is not a statute providing for the regulation of the use of any highway and a statute, moreover, which the court construes as subjecting all *private* carriers coming within its terms to the limitations, restrictions and obligations of *common* carriers.

We shall now address ourselves to the argument by which the California court concluded that the statute, as thus interpreted and construed by it, is nevertheless constitutional even when applied to a *private* carrier operating under a single private contract.

The court frankly concedes that there is no direct authority anywhere in the United States to support its decision (*Frost* decision, R. 80; *Holmes* decision, appendix, p. 24).

We, on our part, shall rely strongly on *Michigan Public Utilities Commission v. Duke,* 266 U. S. 570, and other decisions of this Court and on decisions of the highest courts of Washington, Utah, Ohio and other states, which decisions we believe squarely decide that, as applied to *private* carriers such as these plaintiffs in error, the Auto Stage and Truck Transportation Act violates the Fourteenth Amendment to the Constitution of the United States in the respects hereinafter developed.

B.

The California Auto Stage and Truck Transportation Act takes the private property of these plaintiffs in error for public use without just compensation and deprives them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

1. Argument of Frost Decision.

The Supreme Court of California conceded the well established rule for which we contend that "the state has no power by mere legislative fiat, or even by constitutional enactment, to transmute a private utility into a public utility, or a private carrier into a public carrier" (R. 78).

Thus far, the Court conceded the soundness of each argument advanced by these plaintiffs in error. At this point, however, the Court undertook to distinguish the *Frost* case from said rule by an *argument* (we use this term advisedly and respectfully, but the Court itself conceded that there is no *decision* anywhere directly supporting the argument) which, in order to be absolutely fair to the California Court, we quote in *haec verba:*

> "The argument is that the privilege of using the public highways as a place for the transaction of private business is not a vested right but a privilege which the state may grant or withhold at its pleasure; that having the right to withhold such privileges it may grant the same upon such terms and conditions as it may see fit to impose; that it may say in effect to the applicant for such special privilege, 'I will grant you the privilege of using the public highways for private gain in the transaction of your busi-

> ness upon the condition that *you* in turn *shall dedicate the property used by you in such business to the public use of public transportation'.*" (R. 78-9.)

What the state admittedly can not do *directly* is thus to be accomplished by *indirection.* While the state cannot directly transmute the business of a private carrier into that of a common carrier, the same result is to be accomplished by indirection through a *condition* to the effect that if the private operator uses the public highways it can be only "upon the *condition* that *you* in turn *shall dedicate the property used by you in such business to the public use of public transportation*".

We now desire to offer our comments on this argument.

(1) *Use of Highways.*

This argument is expressly based on the power of the state to regulate the use of its highways.

However, as we have already shown, the decision in the *Frost* case expressly admits and concedes that the Auto Stage and Truck Transportation Act is not and cannot properly be construed to be a statute regulating the use of the highways.

In other words, the argument on which the decision is based is not properly applicable to a statute such as the one here under consideration.

(2) *General Rule as to Use of Highways.*

We next submit that the *premise* on which the Court's argument is based is unsound for the reason

that *there is no general rule to the effect that the state can prevent the use of its highways by private carriers.*

In fact, the general rule is directly to the contrary.

The general rule was well stated by Chief Justice Denio in *Davis v. Mayor of New York,* 14 N. Y. 506, 67 Am. Dec. 186, 187, as follows:

> "The object of a highway or street is to afford to every citizen an opportunity to pass on foot or with his horses and carriages from one locality to another, *and it is essential to the legal idea of such a road that it shall be common to all.*"

The same rule was declared by Chief Justice Cooley in *Macomber v. Nichols,* 34 Mich. 212, 22 Am. Rep. 522, 525, as follows:

> "The highway is a public way for the use of the public in general, for passage and traffic, without distinction. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations."

With the progress of time, however, steam railroads began to be constructed and attempted to construct their tracks on, along and across the public highways. Then came street railroads, first drawn by horses and later propelled by electricity, and then came interurban electric railroads. In order to take care of these situations and to protect the public in the use of the highways, there was established, as an

exception to the general rule, the proposition that as to *common* carriers, the state might prevent the use of the public highways or, if it was willing that they should be used by such *common* carriers, it might establish such reasonable conditions as might be in the public interest.

This exception to the general rule has been applied, from time to time, to other classes of *common* carriers, but *it has never been extended to private carriers using the highways in the pursuit of their private business.*

We respectfully submit that one of the fundamental errors in the *Frost* decision is that it undertakes to treat the *exception* as though it were, in fact, the *general rule.*

There is a line of decisions, referred to in the *Frost* decision, to the effect that the state can prevent the use of its highways by *common* carriers. Such was the case of *LeBlanc v. City of New Orleans,* (La.) 70 So. 213, from which case the *Frost* decision quotes (R. 82). The California court concedes that the cases cited by it and relied on by the respondents are all cases of *common* carriers and that there is no decision applying the court's argument to a *private carrier* (R. 80).

We have made a further exhaustive search and have been unable to find any decision supporting the decision in the *Frost* case.

Both the rule and the exception were, we believe, accurately stated by this Court in *Buck v. Kuykendall,* supra, as follows:

> "A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them (the public highways) by auto vehicle, but he has no right to make the highways his place of business by using them as a *common* carrier *for hire*. Such use is a privilege which may be granted or withheld by the State in its discretion, without violating either the due process clause or the equal protection clause." (p. 324.)

This Court in the foregoing language very carefully limited the exception to cases of *common* carriers and we believe that we are correct in saying that no court, other than the California Supreme Court, has ever extended that exception to a *private* carrier.

(3) *Analogy of Logging Railroads.*

The *Frost* decision states that an analogous situation is presented by the provisions of Article I, Section 14, of the California Constitution, providing, in effect, that any logging or lumbering railroad which avails itself of the power of eminent domain shall thereupon and thereby become a common carrier (R. 86). The Court says that this is a conditional offer by the State and that when the offer is accepted, the acceptance is subject to the condition that the logging or lumbering railroad must thereafter operate as a common carrier.

In the *Holmes* decision, the Court again refers to the assumed analogy of the grant to the citizen of the right to avail himself of the powers of eminent domain (appendix p. 20).

We respectfully submit that this analogy is not in point for the reason that the right of eminent domain is a high prerogative of sovereignty which no private citizen has the right to exercise without express authority from the sovereign. No citizen has any inherent right to take the real property of his neighbor or any portion thereof.

The case is very different from that of the citizen who desires to use the public highways either for pleasure or in the business of transporting his own property or in his private business as a private carrier under a private contract. The citizen has always had the right to so use the public highways, subject only to such reasonable regulations with reference to the *manner* of the *use* of the highways and similar matters which are contained in the Motor Vehicle Acts of the various states.

(4) *Court's Argument Has Never Been Applied in Any Other Decision.*

As we have already pointed out, the *Frost* and the *Holmes* decisions both concede that no other decision anywhere has applied the Court's argument to a *private* carrier.

In no other State of the Union, as far as we can find, is it the law that a citizen desiring to use the public highways for private transportation can be forced, as a condition to such use, to submit to regulation by a State Railroad or Public Service Commission as a common carrier. And in no other State can a private citizen seeking to use the public high-

ways for his private transportation be prohibited from such use by a State Commission for the purpose of protecting an entrenched certificated carrier against his "competition."

The effect of this decision, of course, is to hold that in the State of California it is no longer possible for any private citizen to operate as a private carrier under a private contract over the public highways between fixed termini or over a regular route. The effect of the decision is to abolish and destroy this kind of business in the State of California.

We shall now refer to the decisions which, in our opinion, clearly establish the unsoundness of the California court's decision.

2. The Authorities.

(1) *United States Supreme Court.*

We rely, first, on the decision of this Court in *Michigan Public Utilities Commission v. Duke,* 266 U. S. 570.

In that case, as will be remembered, Duke had employed 75 men and was operating 47 motor trucks as a private carrier under three private contracts for the transportation of automobile bodies from Detroit to Toledo. A statute of Michigan (Act No. 209, Public Utilities Acts of Michigan, 1923), undertook to subject him and others like him to regulation by the State Commission as a *common* carrier. The decision in the *Frost* case correctly states that "the Michigan statute is essentially similar to our Auto Stage and Truck

Transportation Act in its relation to the questions here under consideration * * * " (R. 80).

This Court, of course, held that the application of the Michigan statute to Duke would be an unlawful interference with interstate commerce. Furthermore, as a reason of equal weight, this Court said:

> "Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the *Fourteenth Amendment. Producers Transportation Company v. Railroad Commission,* 251 U. S. 228, 230; *Wolff Co. v. Industrial Commission,* 262 U. S. 522, 535. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property in violation of *that clause* of the Constitution."

We had assumed that this decision disposed of the *Frost* case. However, the *Frost* decision undertakes to distinguish the *Duke* case from the *Frost* case on the ground that Duke's contracts were entered into *prior* to the effective date of the Michigan statute. On this point, the Court said: "To give it (the Michigan statute) effect in its application to his (Duke's) situation would have been to impair the obligation of those contracts" (R. 81).

In the *Holmes* decision, again, the California court seeks to distinguish the decision in the *Duke* case on the same ground, (appendix, p. 21) but Judge

Shenk in his vigorous dissenting opinion takes strong exception to the court's treatment of this Court's decision in the *Duke* case and says:

> "The prevailing opinion attempts to distinguish that case (the *Duke* case) from the one at bar on the ground that Duke's contracts were outstanding at the time the Michigan statute took effect and for that reason the statute was not applicable to him. The Supreme Court of the United States did not base its decision on the impairment of contract clause, but on the fourteenth amendment. Such in my opinion should be the conclusion reached in this case * * *." (appendix, p. 40.)

As Judge Shenk clearly points out, this Court did not say a syllable with reference to the doctrine of impairment of contract obligations or base its decision on the fact that Duke's contracts were entered into prior to the enactment of the Michigan statute.

The point of impairment of contract obligations was directly raised in the bill of complaint in the *Duke* case and was argued throughout the briefs. However, a decision on that ground would have been a *narrow* ground of decision for the reason that it would not have settled the case of a citizen entering upon the business of a private carrier *subsequent* to the enactment of the statute. We believe that this Court intended to render a decision which would set the matter at rest both as to contracts made before and those made after the enactment of the regulatory statute and for that reason based its decision not on the contract clause in Sec. 10 of Art. I of the Federal Constitution, but squarely on the Fourteenth Amend-

ment, forbidding the taking of private property for public use without just compensation.

The point which we desire to make is that this *Court did not base its decision on the doctrine of impairment* of contract obligations or on the fact that Duke's contracts were entered into prior to the enactment of the Michigan statute, and we respectfully submit that it is not proper to distinguish the case on a point on which it was not decided.

Referring further to the *Duke* case, we now invite the Court's attention to the fact that, in his brief before this Court, the Attorney General of Michigan submitted the following argument (Appellant's Brief, pages 15-16).

> "The legislature cannot subject private property to public use without compensation, *but it may condition the use of public property—a public facility—in the transaction of a private business* in such a manner as to insure the convenience and accommodation of the public."
>
> "It is therefore competent for the legislature to require those who at the passage of the act are engaged or *thereafter* engage in motor vehicle transportation for hire on the public highways to do that business as common carriers."

That is the very argument on which the *Frost* decision is based.

With that argument squarely before it, this Court decided the *Duke* case the other way. In other words, the argument upon which the *Frost* decision was rendered did not commend itself to this Court.

In its decision in the *Holmes* case (appendix, p. 21) the California court seeks to escape the effect of the foregoing facts by stating that the Attorney General's argument could not properly be applied in the *Duke* case because Duke was already in business when the statute was enacted and hence had only a Hobson's choice between dedicating his property to the public on the one hand and breaking his contract on the other.

We submit that this argument is not sound for the reason that if the State has the power assumed in the California court's argument, Duke made his contracts subject to the possible exercise of that power by the State at any time and he must be assumed to have made his contracts subject to the contingency that the State might at any time declare that he could not thenceforward continue to use the public highways except on *condition* that he submit to the dedication of his property to *public* use.

A strong analogy may be found in the well established principle that the power of Congress to regulate commerce is not hampered or restricted by contracts previously made between individuals or corporations, but such contracts are made subject to the possibility that Congress may at some future time so legislate as to render them unenforceable or impair their value.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467;

Interstate Commerce Commission v. Atchison, etc. Ry. Co., 234 U. S. 313;

Portland Ry. Light, etc. Co. v. Railroad Commission, 229 U. S. 413;
Murray v. City of Pocatello, 226 U. S. 323.

See also

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558;
Union Drygoods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 375.

Hence, the mere fact that Duke had made his contracts prior to the enactment of the Michigan statute and had established his business prior to that time is, in our opinion, immaterial. If the state has the power assumed by the California court, it could exercise that power over *private* carriers whether their operations commenced *before* or *after* the enactment of the statute and the mere fact of commencement of operations by Duke before the enactment of the Michigan statute would not be determinative in his favor as urged by the California court in the *Holmes* case.

We respectfully submit that if there is any merit in the argument of the California court, there was equal merit in the argument of the Attorney General of Michigan, which argument looked to the future as well as the past.

However, this Court disregarded that argument and placed its decision on this part of the *Duke* case squarely on the broad provisions of the Fourteenth Amendment.

We trust that we may rely on this Court's decision in the *Duke* case as it reads, in which event we be-

lieve that this Court's decision in that case is conclusive in our favor in this case.

In *Producers Transportation Co. v. Railroad Commission of California,* 251 U. S. 228, this Court had before it the California Oil Pipe Line statutes.

By these statutes, enacted in 1913, the Legislature of California undertook to subject to public regulation pipe lines engaged in the transportation of crude oil, including not merely those which were *common* carriers but also those which were *private* carriers.

Among other things, the statutes provided that any company which in its transportation of crude oil ran its pipe lines on, along or across any portion of the public highways should be subject to regulation as a common carrier.

In sustaining the California Supreme Court's decision that the Producers Transportation Company was, in fact, a common carrier and hence subject to regulation by the Railroad Commission, this Court said (pp. 230-1):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, the state could not, by mere legislative fiat, or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment."

See also

Wolff Packing Company v. Court of Industrial Relations of Kansas, 262 U. S. 522, 535.

(2) *Washington Supreme Court.*

The California Supreme Court, while conceding that there is no direct authority in support of its decision, states that its argument finds some support in a Washington decision, *State v. Price,* 210 Pac. 787 (R. 80). The decision also quotes from another Washington case, *Davis v. Nickell,* 126 Wash. 421, 218 Pac. 198 (R. 83-4).

We concede that Washington decisions are persuasive in this case, for the reason that the statute of the State of Washington was modeled on and largely copied from the Auto Stage and Truck Transportation Act of California (Laws of Washington of 1921, ch. 111; Remington's Compiled Statutes, Sec. 6386).

Section 1 (d) of the Act defines "auto transportation company" as the operator of "any motor propelled * * * vehicle used in the business of transporting persons, and/or property for compensation over any public highway in this State between fixed termini or over a regular route, and not operating exclusively within the incorporated limits of any city or town * * *".

This definition, it will be noted, is sufficiently broad to include *private* as well as *common* carriers so operating.

We desire now to invite this Court's particular attention to the fact that said two Washington cases were distinguished and impliedly overruled by the

Supreme Court of Washington in the more recent case of *Davis v. Metcalf,* 131 Wash. 141, 229 Pac. 2, decided on October 7, 1924.

In that case, it appeared that Metcalf had entered into a private contract with a creamery company for the transportation by him of eggs and cream products over the public highways between fixed termini, and over a regular route, for a stated compensation. There, as here, the contract was made *subsequent* to the enactment of the statute. Davis and Banker had a certificate from the Washington Commission covering the same route. They brought suit to enjoin Metcalf. The Superior Court found for the defendant Metcalf and the Supreme Court of Washington affirmed the judgment.

After reviewing some of the earlier Washington decisions, including the *Davis v. Nickell* case, supra, the Supreme Court of Washington, at page 3 of the Reporter, said:

> "In short, and without entering into a detailed discussion of the law or its purpose, we do not believe that it was the intention of the Legislature, and if it were, we think this Court should be slow to hold, that the statute was intended to enable one to obtain and hold such an exclusive monopoly for the carriage of passengers and merchandise over the public highways of the State as to exclude the owners thereof from carrying themselves or their goods or property, either personally, or by agent, *or by an independent contract.*"

In other words, the Supreme Court of Washington has ruled that the owner of goods may, either per-

sonally or by agent *or by an independent contract,* use the public highways for the transportation of goods and property and that such transportation does not subject him to regulation by the State Public Utilities Commission.

This conclusion is reached under a statute substantially identical in this respect with the parent California statute.

In the *Holmes* decision, the California Supreme Court refers to the more recent Washington decision and concedes that

> "the implications of some of the language used in the opinion in that case *(Davis v. Metcalf)* appear to be in conflict with our conclusions in the *Frost* case and herein." (appendix, p. 22.)

The Court then undertakes to distinguish the decision in *Davis v. Metcalf* on the ground that that was a suit in equity in the courts and not a case involving the power of the Railroad Commission to make an order. We do not appreciate the distinction. The case necessarily involved the construction of Section 1 (d) of the Washington Auto Stage and Truck Transportation Act, for the reason that the plaintiff based his cause of action on the contention that under said statutory provision it was the duty of the defendant to secure from the Washington Commission, a certificate before commencing to operate. The defendant had admittedly secured no such certificate.

Notwithstanding the fact that the language of said Section 1 (d) is broad enough to include a *private* carrier, the Washington court refused to so construe

it and decided that the statute should not and could not be so construed so as to apply to the carriage of goods by the owner "personally, or by agent, *or by an independent contract.*"

We submit that the decision is directly in point and is directly opposed to the decision in the *Frost* case.

(3) *Utah Supreme Court.*

In quoting from the Washington case of *Davis v. Nickell,* the decision in the *Frost* case quotes from the Utah Case of *Public Utilities Commission v. Garviloch,* 181 Pac. 272 (R. 84).

However, in the very recent case of *State v. Nelson,* decided on June 20, 1925, 238 Pac. 237, the Supreme Court of Utah distinguished the *Garviloch* case and decided in exact accord with the decision of the Supreme Court of Washington in the *Metcalf* case and in accordance with our contentions in this case.

In the *Nelson* case, it appeared that Nelson was a carrier who had entered into a private contract with the proprietors of a camp known as the "Community Camp" for the transportation of the Camp's guests between the Camp and Salt Lake City for a fixed compensation. Nelson operated over the public highways between fixed termini and over a regular route and *his operations commenced, as here, subsequent to the enactment of the statute.*

The statute there under consideration was the Utah Public Utilities Act, which constitutes Sec. 4782 et

seq. of the Compiled Laws of Utah (1917). Section 4818 provided that certain classes of operators should secure from the Public Utilities Commission certificates of public convenience and necessity before they could begin operations. These operators included "common carriers" and "public utilities" which terms are both so defined as to include the element of service to the public (Sec. 4782, subdivisions 14 and 28).

The classes of operators thus requiring certificates of public convenience and necessity also included, separately, "automobile corporations." This term is defined in Section 4782, subdivision (13) as follows:

> "The term 'automobile corporation', when used in this title, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in, or transacting the business of, transporting passengers or freight, merchandise or other property for compensation, by means of automobiles or motor stages on public streets, roads or highways, along established routes within this State."

As will be noted, the definition is apparently sufficiently broad to include every operator, whether *public* or *private,* engaged in the business of transporting passengers or freight, for compensation over designated routes.

Hence it was not sufficient for the Supreme Court of Utah to determine whether Nelson was a "common carrier" or a "public utility." If he should be found to be neither, he might still be an "automobile corpor-

ation" (even though he was a *private* carrier) and hence subject to the necessity of securing a certificate.

The Utah court first found that Nelson was *not* a *common* carrier. Proceeding further, the court, in order to save the other portions of the statute (referring undoubtedly to the portion defining an "automobile corporation") construed them as applicable only to *common* carriers. Otherwise, those portions of the statute would violate the Fourteenth Amendment to the Federal Constitution and would be unconstitutional.

On this point, the Utah court said (p. 239):

> "No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be public service or a public utility. In other words, the State may not, by mere legislative fiat or edict, by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier."

In reaching this conclusion, the court relied on *Producers Transportation Company v. Railroad Commission,* 176 Cal. 499, 251 U. S. 228, *Associated Pipe Line Company and Associated Oil Company v. Railroad Commission,* 176 Cal. 518, and *Allen v. Railroad Commission,* 179 Cal. 68, all decisions on which we rely.

We invite attention especially to the fact that the foregoing language was used with reference to a business which was commenced *after* and not *before* the

enactment of the statute. In other words, the case was in this respect just like the present case.

The court further said (page 240):

> "It, however, is said that the defendant transported the guests, etc., along the established route of the intervener (a certificated motor truck operator). What of it? The certificate granted the intervener did not give him the right to an exclusive use of the highway or to exclude all others from the canyon who do not patronize him. When a certificate of convenience and necessity to use a public highway is granted by the commission, it is to be hoped the general public still has left some rights in and to the use of the highway, especially in a canyon where the highway is the only passage. Such certificates are to protect and safeguard public interests, and not to oppress or restrain them nor to monopolize the use of the highway."

In the *Holmes* decision, the Supreme Court of California seeks to distinguish the *Nelson* decision on the ground that the Utah statute is different from the California statute (appendix, p. 23). The court quotes the definitions of "public utility" and "common carrier" contained in the Utah statute and properly draws attention to the fact that each of these definitions has in it the element of service to the *public.*

However, the California court does not quote the definition of "automobile corporation" and apparently did not observe that this definition is sufficiently broad to include *private* as well as *common* carriers and that under Section 4818 of the Compiled Laws of

Utah a certificate is required of an "automobile corporation" separate and distinct from the other classes of operators therein mentioned.

We respectfully submit that the effort of the California court to wipe aside this decision, also, has not been successful and that the language which the California court refers to as "obiter" is, in fact, part of the decision and necessary to the decision, as we have hereinbefore shown.

We rely on the Utah decision and believe that we are justified in so doing.

(4) *Ohio Supreme Court.*

In the very recent case of *Hissem v. Guran & Meyers,* 112 Ohio St. 59, 146 N. E. 808, decided by the Supreme Court of Ohio on March 3, 1925, this Court's decision in the *Duke* case is followed and applied.

There, as here, the contract for transportation was entered into *after* the enactment of the statute.

The Motor Transportation Act of Ohio, 110 Ohio Laws 211, effective April 28, 1923, is very similar, in the matter now under consideration, to the Acts of California, Michigan, Washington and Utah.

The Ohio statute undertook by Section 614-2 of the General Code (110 Ohio Laws 212) to provide that every corporation or person engaged in the business of transporting either persons or property, or both, in motor propelled vehicles, for hire, over any public highway "is a motor transportation company and as such is declared to be a *common* carrier."

In other words, the Legislature undertook to declare a private carrier falling within the language of the statute to be a common carrier and to subject him to regulation as such by the Public Utilities Commission of Ohio.

The Court stated the question before it to be as follows (page 809):

> "In this controversy, this Court is required to determine the limitations upon the power and authority of the General Assembly to declare certain persons and firms to be common carriers, when the business conducted by them is such as not to bring them within the common-law definition of common carriers."

Continuing, the Court said (page 809):

> "If their business has not in fact been dedicated to public use and service, any regulation would amount to a taking of private property for public use, and therefore be beyond the power of the State, unless just compensation were first paid in money."

The Court states its conclusion with reference to the interpretation of the Ohio statute as follows (page 810):

> "For the foregoing reasons, and upon the foregoing authorities, any interpretation of section 614-2 which would give state agencies any authority to regulate motor-propelled vehicles employed only in private service would constitute a violation of section 10, art. 1, and of the Fourteenth Amendment, of the Federal Constitution."
>
> "Section 614-2, being a part of a general scheme of legislation to regulate motor vehicle transportation, and essential to the other pro-

visions of the Freeman-Collister Act, this controversy can be disposed of by an interpretation of that section whereby it will be made to apply only to motor-vehicle transportation which comes within the purview of the common-law definition of common carriers."

Finally, the Court said: (page 810):

"The courts may not, however, employ the provisions of that section as an instrument of oppression against a private carrier, even though the business operated by the private carrier might prove to be ruinous to a public carrier operating over the same routes and between the same termini, even though he has made full compliance with all the requirements of the act, and even though he may have been subject to all of the charges, taxes and expenses incident to regulation at the hands of the Public Utilities Commission. The judgment of the Court of Appeals and of the common pleas will therefore be affirmed."

In the *Holmes* case, the Supreme Court of California makes this concession:

"We agree with petitioners that the case of *Hissem v. Guran,* 146 N. E. 808, is in conflict with our conclusion in the *Frost* case (and) herein." (appendix, p. 24.)

While the California court adds that its reasoning does not appear to have been considered by the Ohio court, we venture to suggest that this is not surprising, in view of the California court's own frank statement that its line of reasoning has never been applied by any other court to the case of a *private* carrier.

We respectfully submit that it is clear both on reason and on authority that the California Auto Stage and Truck Transportation Act takes the private property of these plaintiffs in error for public use without just compensation and deprives them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and for that reason we request this Court to make its order reversing the decision herein under review.

C.

The California Auto Stage and Truck Transportation Act denies to these Plaintiffs in Error the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The above heading states our second point.

The situation is very simple. Let us assume two motor trucks, one owned by the Frosts and the other owned by an orange grower at Redlands. They are operated side by side, at the same time, over the same public highway and between the same termini, transporting the same character of goods, namely, packed orange boxes. In each instance the motor truck is being utilized for the transaction of private business on the public highway. There is nothing to indicate that one of these trucks wears out the highways more, or is operated any less skillfully than the other truck.

The only possible difference between these two trucks is that one is operated in the private business

of the operator in the transportation of his own orange boxes, while the other is operated in the private business of the operator in the transportation of the nieghbors' orange boxes for pay. In each case, the highway is being used for the private business of the operator.

We respectfully submit that there is here no "natural, inherent or constitutional distinction" or ground of classification between these two operations, and that if the Frosts are compelled to discontinue the operation of their private business, while at the same time the other truck operator is permitted to continue his private business over the public highways, we have a clear case of a denial to the Frosts of the equal protection of the laws.

The point seems to us to be simple, clear and conclusive.

This Court has, on numerous occasions, announced the governing principles.

In *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews,* 174 U. S. 96, this Court held that

> "the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose on him or it burdens and liabilities which are not cast upon others similarly situated." (p. 104.)

Further, this Court said (p. 105):

> "Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the

> object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. *Yick Wo v. Hopkins,* 118 U. S. 356."

In *Southern Railway Co. v. Greene,* 216 U. S. 400, this Court said (p. 417):

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substanial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." (Citing authorities.)

In *Atchison, Topeka & Santa Fe Railway Co. v. Vosburg,* 238 U. S. 56, this Court said (p. 59):

> "The constitutional guaranty entitles all persons and corporations within the jurisdiction of the State to the protection of equal laws in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

In *Truax v. Corrigan,* 257 U. S. 312, this Court draws attention to the fact that the equal protection of the laws clause of the Fourteenth Amendment sought an equality of treatment of all persons even though all enjoyed the protection of due process. The Court also quotes with approval and comments on the language of Mr. Justice Matthews in *Yick Wo v.*

Hopkins, supra, in which case, speaking of both the due process and the equality clauses of the Fourteenth Amendment, Mr. Justice Matthews said:

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*" (Italics by the Court). (p. 333.)

In *Air-way Electric Appliance Corporation v. Day,* 266 U. S. 71, this Court again draws attention to the requirement that lawful classification must have a reasonable relation to the purpose for which it was made (p. 85).

The foregoing principles were recognized by the Supreme Court of California in *Franchise Motor Freight Association v. Seavey,* 69 Cal. Dec. 473, 235 Pac. 1000, decided on April 27, 1925, in which case the legislature of California had sought, by amendment of the California Auto Stage and Truck Transportation Act, to carve out of the general class of common carrier truck companies subject to regulation by the Railroad Commission a special class which should be exempted from such regulation. This special class consisted of truck operators engaged as common carriers in the movement of products or implements of husbandry and other farm necessities from farm to farm or between farms and loading points. The Court held that the attempted exemption was invalid because it undertook to confer

> "particular privileges on a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other". (p. 476.)

In the *Franchise Motor Freight Association* case, it was attempted to carve a specially favored class out of *common* carrier motor truck operators. In the present case, it is attempted to carve a similar class out of *private* motor truck operators. We see no logical basis for sustaining the one attempted classification any more than the other. In each case, it is attempted to set up out of a general group a classification which is not founded on any reasonable distinction or substantial difference bearing any reasonable relation to the objects sought to be accomplished by the statute.

The only answer made by the Supreme Court of California to our claim of denial of equal protection of the laws is found in the *Holmes* decision (appendix p. 25), in which the Court seeks to justify the classification on the ground that the owner who carries his own packed orange boxes from the packing house to the shipping point over the public highways in his own motor truck is not a carrier at all. This is a distinction which does not appeal to us. It is difficult to understand how one who *carries* is not a *carrier.*

The term "carrier" is defined to be "one who or that which carries or conveys" *(Century Dictionary.)*

While it is true that an owner who carries his own goods is not subject to the obligations which pertain to a contract of carriage for third persons, he nevertheless is a carrier of his goods. As far as his legal right to the use of the highways is concerned, we submit that the Supreme Court of Washington was indisputably correct when in *Davis v. Metcalf,* 131 Wash. 141, 229 Pac. 2, the Court held that the owner of goods has the lawful right to carry them on the highways

> "either personally, or by agent, *or by an independent contract.*"

We respectfully submit that a classification by which the owner, personally or by agent, is put in one class and his independent contractor is put in another class with reference to the use of the highways, in such a way that the independent contractor can be forced out of business or refused the right to operate at all on the public highways, while the owner may operate personally or by agent without regulation, is an arbitrary and unreasonable classification which has no just or reasonable relation to the object sought to be accomplished and which denies to the private contractor the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit that the decision of the Supreme Court of California herein under review should be reversed.

Dated at San Francisco, California, March 22, 1926.

MAX THELEN,
H. H. SANBORN,
DELANCEY C. SMITH,
FRANK R. DEVLIN,
DOUGLAS BROOKMAN,
Attorneys for Plaintiffs in Error.

LEONARD, SURR & HELLYER,
THELEN & MARRIN,
SANBORN & ROEHL and DELANCEY C. SMITH,
DEVLIN & BROOKMAN,
EDWIN C. BLANCHARD,
Of Counsel.

Appendix No. 1

AUTO STAGE AND TRUCK TRANSPORTATION ACT.

CHAPTER 213, STATUTES 1917, PAGE 330.

(Approved May 10, 1917)

Amended by Ch. 280, Stats. 1919, p. 457; Ch. 840, Stats. 1921, p. 1609 Ch. 310, Stats. 1923, p. 644; Stats. 1925, Ch. 145, p. 297; Ch. 153, p. 302; Ch. 254, p. 433.

An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by automobiles, jitney busses, auto trucks, stages and auto stages; defining transportation companies and providing for the supervision and regulation thereof by the railroad commission; providing for the enforcement of the provisions of this act and for the punishment of violations thereof; and repealing all acts inconsistent with the provisions of this act.

The people of the State of California do enact as follows:

SECTION 1. (*a*) The term "corporation," when used in this act, means a corporation, a company, an association or a joint stock association.

(*b*) The term "person," when used in this act, means an individual, a firm or copartnership.

(*c*) The term "transportation company," when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed

by any court whatsoever, owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term "transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term "transportation company" as herein defined.

(*d*) The term "public highway," when used in this act, means every public street or highway in this state.

(*e*) The words "between fixed termini or over a regular route," when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney

bus, auto truck, stage or auto stage is operated by a transportation company "between fixed termini or over a regular route" within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review. [Amended, Ch. 280, Stats. 1919, p. 457; and Ch. 145, Stats. 1925, p. 297.]

SEC. 2. No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

SEC. 3. [Section 3 was repealed by Ch. 280, Stats. 1919, pp. 457, 460.]

SEC. 4. The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation company in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts, service and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The railroad commission shall have power and authority, by general order

or otherwise, to prescribe rules and regulations applicable to any and all transportation companies. The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the order, rule or regulation of the railroad commission shall in each instance prevail.

SEC. 5. No transportation company shall hereafter begin to operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property, for compensation, on any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective, or for operations exclusively within the limits of an incorporated city, town, or city and county. Any right, privilege, franchise or permit held, owned or obtained by any transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the railroad commission. The railroad commission

shall have power, with or without hearing to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

The railroad commission may at any time for a good cause suspend and upon notice to the grantee of any certificate an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section. [Amended, Ch. 280, Stats. 1919, p. 457.]

Each application for a certificate of public convenience and necessity or for an order authorizing the sale, leasing, assignment or transfer of an existing operative right, privilege, franchise or permit made under the provisions of this section must be accompanied by a fee of fifty dollars; *provided, however,* the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouse or other initial point shall not be subject to the regulations of this act. [Amended by Ch. 310, Stats. of 1923, p. 644.] (Above *proviso* declared unconstitutional Apr. 27, 1925, *Franchise Motor Freight Ass'n v. Railroad Commission,* 69 C. D. 473; 235 Pac. 1000.)

SEC. 6. No transportation company may issue any stock or stock certificate, or any bond, or any note

or other evidence of indebtedness payable at a period of more than twelve months after the date thereof unless such transportation company, in addition to the other requirements of law, shall first have secured from the railroad commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that, in the opinion of the railroad commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order and that, except as otherwise permitted in the order in the case of bonds, notes and other evidences of indebtedness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. Such order may be made, in the discretion of the railroad commission, either with or without a public hearing. Except as in this section otherwise provided, the provisions of section fifty-two of the public utilities act referring to the purposes for which stocks and stock certificates, bonds, notes and other evidences of indebtedness, may be issued and the application of and the accounting for the proceeds thereof, the powers and duties of the railroad commission and the rights and duties of public utilities with reference thereto, the legal status of stocks and stock certificates and of bonds, notes and other evidences of indebtedness, issued without an order of the railroad commission then in effect, and the relationship of the State of California to such stocks and stock certificates, and

such bonds, notes and other evidences of indebtedness, shall apply to and govern the issue of stocks and stock certificates, and of bonds, notes and other evidences of indebtedness, of transportation companies with the same force and effect as though section fifty-two of the public utilities act were restated in this section with the substitution of the words "transportation company" for the words "public utility" and of the words "transportation companies" for the words "public utilities". The provisions of section fifty-seven of the public utilities act referring to fees to be charged and collected by the railroad commission for certificates authorizing the issue of bonds, notes or other evidences of indebtedness of public utilities shall apply to and govern authorizations by the railroad commission of the issue by transportation companies of bonds, notes or other evidences of indebtedness. [Amended, Ch. 280, Stats. 1919, p. 457.]

SEC. 6*a*. Every transportation company shall annually furnish to the commission at such time and in such form as the commission may require a report in which the transportation company shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any transportation company to file monthly reports of earnings and expenses, and to file periodical or special or both periodical and special reports concerning any matter about which the commission is authorized by this or any other act to enquire or to keep itself informed, or which it is required to en-

force. All reports shall be under oath when required by the commission. [Added, Ch. 840, Stats. 1921, p. 1609.]

SEC. 6*b*. No transportation company subject to the provisions of this act shall, directly or indirectly, issue, give or tender any fare, ticket, free pass, or free or reduced rate transportation for passengers or freight between points within this state, except to such person or persons as common carriers under and in accordance with the provisions of the public utilities act, are permitted to issue such fare, ticket, free passes, or free or reduced transportation and except to officers or employees of transportation companies as defined under this act. [Added Ch. 840, Stats. 1921, p. 1609.]

SEC. 7. (a) In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the railroad commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court, in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act.

(*b*) No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hear-

ing before the commission or any commissioner or examiner when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath have testified or produced documentary evidence; *provided,* that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any transportation company immunity of any kind. [Amended, Ch. 153, Stats. 1925, p. 302.]

SEC. 8. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the railroad commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

SEC. 9. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress; *provided, however,* that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the railroad commission shall have the power to prescribe such reasonable, uniform and non-discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity. [Amended, Ch. 254, Stats. 1925, p. 433.]

SEC. 10. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. The provisions of an act entitled "An act providing for the sale of street railroad and other franchises in

counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts (approved March 22, 1905; Stats. 1905, p. 777)," are declared not to apply to the use of highways for the kind of transportation herein regulated.

Appendix No. 2

S. F. No. 11467. In Bank. December 23, 1925.

Henry E. Holmes et al., Petitioners,

vs.

Railroad Commission of the State of California et al., Respondents.

[1] AUTO STAGE AND TRUCK TRANSPORTATION ACT—AMENDMENT OF 1919—REGULATION OF PRIVATE CARRIERS—JURISDICTION OF RAILROAD COMMISSION.—The legislature by the 1919 amendment to the Auto Stage and Truck Transportation Act plainly intended and attempted to extend the jurisdiction of the Railroad Commission to private carriers when engaged in the business of transportation companies as there defined and to subject such private carriers to the burdens, obligations and limitations imposed by that act.

[2] ID.—USE OF HIGHWAYS—CONTROL BY STATE.—It is now universally recognized that the state has the power to impose the burdens and limitations prescribed by the Auto Stage and Truck Transportation Act upon private carriers when using the public highways for the transaction of their business in the transportation of persons or property for hire.

[3] ID.—RIGHT TO USE HIGHWAY FOR PRIVATE BUSINESS—CONSTITUTIONAL LAW.—The rule stated by the Supreme Court of the United States in *Buck v. Kuykendall*, 45 Sup. Ct. Rep. 324, that "A citizen may have, under the fourteenth amendment, the right to travel and transport his property upon them (the public highways) by auto vehicle, but he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause," is equally applicable to all persons who seek to make a special and private use of the public highways by transacting their private business thereon, and it applies with equal force to private carriers who engage in the business of transportation for hire upon the public highways.

[4] ID.—USE OF HIGHWAYS BY PRIVATE CARRIERS FOR HIRE—COMMON CARRIERS.—The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers, but it is that they are making a private use of the public highways, which are owned and paid for by the public and which are open alike to all persons.

[5] STATUTORY CONSTRUCTION—UNIFORM OPERATION—CLASSIFICATION.—A statute is not lacking if it operates alike upon all those comprised within a class defined therein which is based upon some natural, inherent or constitutional ground of classification.

[6] AUTO STAGE AND TRUCK TRANSPORTATION ACT—DISCRETION OF RAILROAD COMMISSION—CONSTITUTIONAL LAW.—There is no merit in the suggestion that the Auto Stage and Truck Transportation Act is unconstitutional in that it vests an arbitrary discretion in the Railroad Commission, since the discretion of the Commission is not arbitrary but is controlled and guided by the relation of the facts found by it to the public convenience and necessity.

Application for certiorari to review an order of the Railroad Commission directing petitioners to desist from operating automobile trucks on the public highways. Order *affirmed*. Shenk, J., *dissents*.

For Petitioners—Thelen & Marrin.

For Respondents—Carl I. Wheat, W. M. Taylor.

For Respondent Highway Transport Co.—Gwyn H. Baker.

For Respondent S. B. McLenegan & Son—Walter H. Robinson.

Review to annul a decision and order of the respondent Railroad Commission. The decision sought to be reviewed was the outcome of a proceeding before the Commission wherein the respondents Highway Transport Company and S. B. McLenegan & Son, both "certificated" common carriers of freight by motor truck between San Francisco and San Jose and intermediate points, filed complaint alleging that the petitioners herein were operating motor trucks without having obtained a certificate of public convenience and necessity to do so for the transportation of freight for hire over the public highways between San Francisco and San Jose and intermediate points along and over the same routes and roads over which the complainants were operating; that such operations were in violation of law, were in direct competition with the complainants, and resulted in injury and damage to them. The defendants therein, petitioners here, filed an answer denying the allegations of the complaint and setting up as a separate defense that defendants were the owners of certain automobile trucks which they leased to a number of "se-

lected" shippers of freight for use by said shippers in the distribution of merchandise between San Francisco and such points in San Mateo and Santa Clara counties as from time to time served the convenience and necessity of said shippers. The answer further denied that the defendants were common carriers, that they operated between fixed termini or over a regular route, that they were operating in violation of law and that they were subject to the jurisdiction of the Railroad Commission. Upon the issues thus joined the Railroad Commission after due notice and after a full and extended hearing rendered its decision and order now before this court for review, wherein it was found that the defendants, petitioners herein, were operating as a transportation company as that term is defined in section 1 (c) of Chapter 213, Statutes of 1917 as amended, and that they were engaged in the operation of motor trucks over the public highways for compensation, over a regular route and between fixed termini, namely, "San Francisco to San Jose and intermediate points". The Commission thereupon made its order directing the defendants to cease and thereafter to desist from any and all such transportation unless and until they should secure a certificate of public convenience and necessity therefor. The defendants, after the denial of their petition for a rehearing of said order and decision, instituted the present proceedings in this court for a writ of review to annul the same.

Petitioners were engaged in operating three motor trucks in the transportation of merchandise consisting

principally of drugs, drug sundries and groceries from wholesale houses in San Francisco to retail dealers in San Jose and at other points in Santa Clara and San Mateo counties, which points, for the most part, are intermediate points between San Francisco and San Jose. Petitioners operated under separate contracts with the several shippers, twenty-three in number, each contract being entered into severally by petitioners as one party and by one of the shippers as the other party thereto. These contracts were substantially alike in their terms (except as to minor variations not deemed pertinent to the present inquiry). By each of these contracts the petitioners purported to lease their trucks to the shipper for use by the latter in transporting its merchandise from San Francisco to points in Santa Clara and San Mateo counties at an agreed rental of $19.50 per truck per day. It is further provided that if on any day only a portion of the capacity of any truck is used for such transportation the rental shall be such proportion of said rental of $19.50 as is represented by the ratio which the capacity of the truck actually utilized in the transportation of the lessee's merchandise bears to the total agreed capacity of the truck, and, further, that the minimum rental in connection with any transportation shall be based on one-thirtieth of the capacity of the truck. It is apparent from the other provisions of these "leases" and from the manner in which they were performed by the parties that they are nothing more than contracts for the transportation of merchandise for compensation at the rate of thirty-two

and one-half cents per hundred pounds, subject to a minimum charge of sixty-five cents per shipment. The Commission so found and its finding is abundantly supported, if not compelled, by the evidence. The Commission did not expressly find upon the issue as to whether or not the petitioners were operating as common carriers, which was alleged in the complaint and denied in the answer. The finding is that the petitioners "are operating a transportation company as that term is defined in section 1 (c) of chapter 213 of the Statutes of 1917 and amendments thereto; that they are engaged in the operation of auto trucks over the public highways for compensation, over a regular route and between fixed termini, namely, San Francisco to San Jose and intermediate points, . . ." Petitioners contend that this finding must be taken by us as a negative finding upon the allegation that they were operating as common carriers and we are inclined to agree with this contention. The carrier respondents strongly insist that under the rule which requires the construction of findings so as to support the judgment we should construe this as a finding that petitioners were in fact operating as common carriers and that such finding is amply supported by the evidence herein. It may be that the evidence herein would sustain such a finding if it had been made by the Commission. As to that we express no opinion. We are of the opinion that the present is not a proper case for the application of the rule invoked by the carrier respondents. A careful reading of the entire decision of the Commission, of which

the quoted finding forms but a part, makes it clear that the Commission did not intend to find as a fact that petitioners were operating as common carriers. On the contrary, the Commission took the view that petitioners were subject to its jurisdiction under the other facts and circumstances found herein, regardless of the question whether they were operating as common carriers or as private carriers, and in accordance with that view it deliberately and intentionally omitted to find upon this question. If, therefore, we should conclude that the operation of petitioners as common carriers is a fact essential to the jurisdiction of the Commission over them, it would be our duty to annul this decision and order. This precise question was involved in the recent case of *Frost v. Railroad Commission* (70 Cal. Dec. 457, — Pac. —), which was decided by us adversely to petitioners' contentions herein. That case must be regarded as controlling with respect to this phase of the present inquiry, and the respective counsel for the petitioners and for the Railroad Commission so concede. Counsel for petitioners argue most earnestly that our decision in the Frost case is erroneous and should be promptly overruled. We have given careful consideration to these arguments and are not disposed to depart from our views as expressed in that case. The gist of our conclusion in that case may be briefly stated as follows: [1] The legislature by the 1919 amendment to the Auto Stage and Truck Transportation Act plainly intended and attempted to extend the jurisdiction of the Railroad Commission to private

carriers when engaged in the business of transportation companies as there defined and to subject such private carriers to the burdens, obligations and limitations imposed by that act. The question, then, is whether the state has the power to impose such burdens and limitations upon private carriers when using the public highways for the transaction of their business or whether its power in this behalf is limited in its application to public carriers. [2] It is now universally recognized that the state does possess such power with respect to common carriers using the public highways for the transaction of their business in the transportation of persons or property for hire. That rule is stated as follows by the Supreme Court of the United States: "A citizen may have under the Fourteenth Amendment, the right to travel and transport his property upon them (the public highways) by auto vehicle, but he has no right to make the highways his place of business by using them *as a common carrier for hire.* Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause." (*Buck v. Kuykendall,* 45 Sup. Ct. Rep. 324. Italics added) Petitioners emphasize the words which we have italicized and insist that this rule is limited in its application to common carriers. [3] We think it is equally applicable to all persons who seek to make a special and private use of the public highways by transacting their private business thereon and that it applies with equal force to private carriers who engage in the

business of transportation for hire upon the public highways. [4] The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers. It is that they are making a private use of the public highways, which are owned and paid for by the public and which are open alike to all persons. It is true that common carriers are subject to regulation by the state because the fact that they are engaged in public service causes their business to be affected with public interest and thus justifies the regulation thereof by public authority. But this is not, as it seems to us, the reason for the existence of the rule above quoted. The circumstance that they are public carriers would subject them to *regulation,* but it would not subject their business to *complete prohibition,* it being a business which is not inherently unlawful or wrongful, but it is universally conceded that the state does have the power and the right to completely prohibit the use of its public highways by a common carrier. This must rest not upon the fact that he is a common carrier, but upon the fact he is making a private use of the public highways. This conclusion is not based, as petitioners assert, upon the power of the state to *regulate the use* of its highways. It is based upon the power of the state *to prohibit the private use* of its highways or in its discretion to grant the privilege of such private use upon such conditions as it may see fit to impose. By the statute here in question the state says in effect to the citizen: "I will grant you the special privilege

of using my highways for your private business upon condition that you in turn submit yourself and your property to such regulations as I impose. I will not compel you to submit to these regulations, but if you are not willing to do so, I shall not grant you this special privilege." A conclusion somewhat analogous to this is presented in the case of *Producers Transportation Company v. Railroad Commission* (176 Cal. 499), relied upon by petitioners herein. It was there held that a state has no power by mere legislative fiat, nor even by such fiat embodied in its constitution, to transmute a private carrier into a common carrier. With that conclusion we are in entire accord, but it was also there held that if a private carrier exercises the right of eminent domain in aid of his transportation business he will be deemed thereby to have dedicated his transportation system to a public use and to have thereby become a public carrier. The circumstance that the right of eminent domain is a right of sovereignty which is inherent in the state does not seem to us of particular importance. The important fact, as it seems to us, is that the right of eminent domain is not possessed by individuals as a matter of right. When the state offers to grant this right to an individual, it is as to him a special privilege. If the state offers this privilege to him upon expressed conditions, he will be deemed, if he exercises the right, to have accepted the offer and to have agreed to the conditions. He is under no compulsion to submit to the conditions. If he does not submit to the conditions he cannot exercise the privilege. If

he does exercise the privilege he will be deemed to have voluntarily agreed to the conditions. Herein lies the distinction between the present case and the case of *Michigan Public Utilities Comm. v. Duke* (45 Sup. Ct. Rep. 191). Counsel for petitioners direct our attention to the fact that the reasoning adopted by us in the Frost case and adhered to herein was urged upon the Supreme Court of the United States in the Duke case and was by that court rejected. We agree that it was properly rejected in that case because it was not tenable under the facts of that case. It could not be said that by continuing in the transportation of property for hire after the enactment of the Michigan Public Utilities Act Duke had voluntarily elected to dedicate his property to a public use, because Duke had no opportunity for an election. He had no choice but to continue in the transportation of property after the enactment of the statute. He was under compulsion so to do because of his contracts which were in existence and subsisting at the time of its enactment. Therefore, to hold the statute applicable to him would be to say in effect that the state had the power to transmute him from a private carrier into a public carrier *nolens volens,* and this we agree it could not do. This is what we had in mind when we said in this connection in the Frost case, "to give it effect in its application to his situation would have been to impair the obligation of those contracts." We intended thereby to point out that the only liberty of choice offered by the Michigan statute in its application to Duke was a Hobson's choice between

dedicating his property to the public on the one hand and breaching his contracts on the other. We did not intend thereby to intimate that the decision of the United States Supreme Court in the Duke case was rested in part upon the impairment of the contracts provision of the federal Constitution. It clearly was not. In the present case the petitioners did not enter into the transportation business until long after the enactment of the statute here in question. We find here no such obstacle as there was in the Duke case in the way of the conclusion that by so doing petitioners must be deemed to have voluntarily elected to submit themselves to the conditions imposed by the statute. We do not agree with petitioners that the Washington decisions cited by us in the Frost case have all been overruled by the later decisions of that court in *Davis v. Metcalf* (229 Pac. 2). They were not expressly overruled therein. On the contrary, they are cited with apparent approval. It must be conceded, however, that the implications of some of the language used in the opinion in that case appear to be in conflict with our conclusions in the Frost case and herein. That case, however, did not involve the question of the *power* of the Railroad Commission to make an order in respect of a private carrier such as is here under review. That case arose as a suit in equity by a certificated carrier to procure an injunction restraining an uncertificated carrier from transporting goods for compensation over a regular route in competition with the plaintiff. The trial court denied the injunction and the Supreme Court affirmed the judg-

ment. It does not necessarily follow from anything said or decided in that case that if the Railroad Commission of that state had, after a hearing, made an order requiring the defendant to desist from further transportation over the highways until he obtained a certificate of public convenience and necessity, that such order would have been annulled by the court. That question has not yet been litigated in the state of Washington so far as we are advised. The recent Utah case of *State v. Nelson* (238 Pac. 237) is, we think, distinguished from the present case by the differences in the Utah statute. The grant of jurisdiction to the commission in that statute is "to supervise and regulate every public utility in this state as defined in this title . . ." The term "public utility" is defined to include "every . . . automobile corporation . . . *where the service is performed for or the commodity delivered to the public* or any portion thereof". The term "common carrier" is defined to include "every . . . automobile corporation . . . operating *for public service* within this state; and every person or corporation . . . engaged in the transportation of persons or property *for public service* over regular routes between points within this state". (Italics added.) The section of the Utah statute providing for the issuance of certificates of public convenience and necessity, while it does not expressly so provide, nevertheless indicates by clear implication the legislative intent that it shall be applicable only to public utilities as above defined. The Utah court held correctly, as we think, that the intent of the Utah

statute was to limit the regulatory powers of the railroad commission to common carriers and other public utilities. Having reached this conclusion the language in its opinion which is relied upon by petitioners herein must, as it seems to us, be regarded as obiter. We agree with petitioners that the case of *Hissem v. Guran,* 146 N. E. 808, is in conflict with our conclusion in the Frost case herein. It may be noted, however, that the reasoning which has impelled us to our conclusion does not appear to have been suggested to or at all considered by that court. We are disposed to adhere to that conclusion, notwithstanding the absence of any direct authority to support it.

If the foregoing conclusion is sound, it is, as it seems to us, a sufficient answer to all of petitioners' contentions based upon the guarantees of the federal Constitution, with the possible exception of the contention that the Auto Stage and Truck Transportation Act as amended and as construed by us denies to petitioners the equal protection of the law. Petitioners' first point under this contention is disposed of by our decision in the case of *Franchise Motor Freight Assn. v. Seavey,* 69 Cal. Dec. 473, — Pac. —. Petitioners seemingly take the position that there is no legitimate basis for a classification and distinction between private carriers engaged in the business of transporting freight over the public highways on the one hand and private individuals engaged in other lines of business transporting their own freight over the public highways as an incident to such business on the other hand. Petitioners propound the follow-

ing question: "What reasonable ground of distinction is there between a *private* carrier engaged in the business of transporting his own freight over the public highway between two points and another *private* carrier who is engaged in the transportation of the same class of freight between the same points at the same time over the same highway, the only distinction being that the freight transported by the latter belongs to his neighbor or some other third party instead of to himself?" The facts assumed in this question are self-contradictory. One who transports merely his own freight over the highway is not a carrier, private or otherwise. He may be a farmer or a manufacturer or a merchant or what not, but the business in which he is engaged is not the business of transportation. He is not a carrier unless he engages in the business of transportation of the persons or property of others for compensation. One who transports merely his own goods is of necessity engaged in some business other than transportation and the transportation of such goods is no more than an incident to such business. So, also, one who transports the goods of another as a servant or agent of such other is not engaged in the business of transportation, but in so doing is engaged in the business of his master or principal, whatever that business may be. But one who engages as an independent calling in the transportation of goods for another or for others under contract and for compensation is engaged in the business of transportation and is a carrier. The true question in this behalf is, therefore, is there a natural

or inherent basis for a classification and distinction between those who engage in the business of transportation of the property of others for compensation over the public highways, thus making a private use of those highways, and those on the other hand who are engaged in other lines of business and who use the highways in the transportation of their goods merely as an incident to such business, for which purpose the highways are open alike to all? This question seems to us to answer itself. [5] It is too well settled to require citation of authority that a statute is not lacking in uniformity if it operates alike upon all those comprised within a class defined therein which is based upon some natural, inherent or constitutional ground of classification.

[6] We find no merit in the suggestion that the act is unconstitutional in that it vests an arbitrary discretion in the Railroad Commission. The discretion of the Commission is not arbitrary but is controlled and guided by the relation of the facts found by it to the public convenience and necessity (*Tarpey v. McClure,* 190 Cal. 593, 600, and cases cited).

The final contention necessary to be considered herein is that the finding of the Commission to the effect that petitioners were operating between fixed termini and over a regular route is unsustained by the evidence. The statute defines the words "between fixed termini or over a regular route" to mean "the termini or route between or over which any corporation or person * * * usually or ordinarily operate any automobile, bus, auto truck, stage or auto stage,

. even though there may be departures from said termini or route, whether such departures be periodic or irregular". It also provides that this shall be a question of fact and that the finding of the Commission thereon shall be final and shall not be subject to review. We agree with petitioners that the finding is, however, subject to review, notwithstanding the last-mentioned provisions of the statute, for the reason that the fact in question is one which is essential to the jurisdiction of the Commission. Such review, however, cannot extend beyond the inquiry as to whether or not there is some substantial evidence to support the finding. If there is, the finding must be sustained, no matter how much evidence there may be in conflict therewith. In this connection it is to be noted, however, that it is not necessary that the evidence shall sustain both of the findings of the Commission, namely, that petitioners were operating between fixed termini and that they were operating over a regular route. The statute is in the disjunctive and it is sufficient in this connection to sustain the jurisdiction of the Commission if there was substantial evidence to support either of these findings. The decision of the Commission contains a fair resume of the evidence upon this question and we quote therefrom as follows: "Defendants contend that they are not operating between fixed termini nor over any regular route, because they have had no depot at any point in San Mateo or Santa Clara counties, nor have they a telephone at such points; that deliveries are made either to store or sidewalk; that there is no

point in any city or town in San Mateo or Santa Clara counties which constitutes a terminus, since the destination of trucks is determined entirely by the load which the 'lessees' of the particular truck happen to offer for transportation on that particular trip; and that there are no cities or towns in San Mateo or Santa Clara county to which any trucks regularly go on all trips.

"It is true that each and every truck operated down the Peninsula by defendants does not stop for pick-up or delivery of merchandise at each and every point along the highway, San Francisco to San Jose, inclusive, and that on occasions the trucks have gone off the highway for several miles to make deliveries to points such as the County Poor Farm back of Belmont, Camp No. 4 on the Skyline Boulevard, Chadwick and Sykes' Camp three miles east of Redwood City, etc. The evidence, however, does show that there is only one main highway known as the Peninsula Highway over which the trucks of the defendants usually or ordinarily operate; that defendants' drivers are instructed during fair weather to use what is known as the Bay Shore Highway out of San Francisco to its connection with the main Peninsula Highway at San Bruno and in rainy weather to use the Mission Road through Colma to San Bruno. From San Bruno there is but a single route through Burlingame, San Mateo, Belmont, Redwood City, Menlo Park, Palo Alto and other intermediate points, to San Jose. This main State Highway is usually and ordinarily used with the exception of the infrequent

occasions upon which, as mentioned above a truck carries merchandise destined to points somewhat off the highway.

"In connection with defendants' Exhibit No. 12, entitled 'Some Routes used by H. E. and P. W. Holmes', P. W. Holmes testified that no two of such routes were alike. Route No. 3 names Redwood City only; No. 5 Burlingame-Redwood City; No. 12 Redwood City-Burlingame. These three routes, however, when taken in connection with San Francisco as a northern terminus, are identical in every respect. Transposing the names of communities does not differentiate as to route over which the trucks travel, but merely shows a difference in the routing of particular deliveries. In fact, this entire exhibit in the main substantiates the contention of complainants that defendants' trucks do usually and ordinarily operate over a regular route or between fixed termini as represented by manifests therein named.

"Defendants further contend that they have no fixed termini due to the fact that the manifests submitted in the evidence covering the month of January, 1924, show a different southerly terminus on different trips. Analysis of this evidence shows that during the thirty-day period above mentioned, San Jose or a point immediately adjacent to the city limits of San Jose, such as Alum Rock, Meridian Road, etc., appears as the most southerly terminus upon twenty occasions, the most southerly destination on other occasions being some point along what is

known as the main Peninsula Highway, San Francisco to San Jose, such as Redwood City, which appears some seven times, or Palo Alto, which appears some five times.

"Certainly if a truck carries no merchandise for delivery upon a specified trip which would necessitate it going the entire length of its route and has no call for a pick-up on the northbound trip, it would in any case turn back after making its most southerly delivery, and if this Commission should hold that the law contemplated this class of operation as not being over a regular route no truck operator in the state could be held to fall within the provisions of the state regulation, due to the fact that one or more of his trucks on infrequent occasions might not cover the entire route usually or ordinarily served by him."

In addition to the foregoing it may be noted that at the hearing before the Commission petitioners introduced an exhibit consisting of a schedule showing the points of all deliveries made by them during the second week of each of the months of December, 1923, and January, February and March, 1924, in connection with which they produced testimony that the deliveries during those weeks were fairly typical of all of their operations. The schedule shows all of the deliveries made by petitioners on twenty-three working days comprising those weeks and it appears therefrom that upon every one of those days petitioners made deliveries from San Francisco to San Jose and to intermediate points. Under the statute it is immaterial that there were departures from the termini

and from the route "whether such departures be periodic or irregular". We are satisfied that the finding of the Commission is sustained by the evidence, and if it were conceded that the evidence would equally sustain a contrary finding that circumstance would be immaterial.

The decision and order of the Commission are affirmed and the writ discharged.

MYERS, C. J.

We concur:

LAWLOR, J.
RICHARDS, J.
WASTE, J.
SEAWELL, J.
LENNON, J.

DISSENTING OPINION.

I dissent. I cannot agree with the reasoning and conclusion of the prevailing opinion. It appears that the petitioners had applied to the Commission for a certificate of public convenience and necessity. By that application they impliedly consented to subject themselves to the jurisdiction of the Commission and to comply with the conditions which the law and the Commission might impose. Included in those conditions under section 4 of the Auto Stage and Truck Transportation Act would be that the Commission should have the power to fix their rates, regulate their service and in general provide that the applicant operate as a common carrier in the event that the

certificate be issued. The application however was denied. Such action was within the power of the Commission under section 7 of the act, which provides that the Commission may grant or deny such a certificate "with or without hearing". The petitioners established themselves as a private carrier. The respondent certificated carriers filed a complaint against them before the Commission, alleging that the petitioners were a transportation company as defined by the Auto Stage and Truck Transportation Act and as such were operating in direct competition with the complainants and were injuring and damaging their business. The petitioners were summoned before the Commission and in an answer filed by them they denied that they were a transportation company as defined by the act. After notice and an extended hearing the Commission found that the petitioners were a transportation company operating as a private carrier and issued an injunction directing them "to cease and hereafter to desist from any and all such transportation unless and until they have secured from this Commission a certificate declaring that public convenience and necessity require the resumption or continuance thereof". The effect of the decision and order of the Commission is to put the petitioners out of business, for it enjoins them from operating "unless and until" they obtain a certificate and on application the Commission denies the certificate.

Under sections 22 and 23 of article XII of the Constitution and the decisions of this court the Com-

mission has jurisdiction only of the regulation and control of public utilities and matters which are germane to such regulation and control. This is conceded in the prevailing opinion but it is held, following the Frost case, that the regulation of such a private carrier is so germane because forsooth the private carrier is in competition with the public carrier. This conclusion in my opinion is not supported either by reason or authority. If that conclusion be sound the result would be that the Commission may now require a truck owner, engaged exclusively in the business of operating his truck for transportation of freight on the public highways under contract with the sole owner of a chain of stores, to apply for a certificate of public convenience and necessity or go out of business and by denying his application put him out of business. To pursue the subject still further it would logically follow that the Commission could be endowed by the legislature under the present constitutional grant with the power to say that no one may use the public highways for the transportation of his own goods because by so doing he would take from the certificated operator a revenue which the latter might otherwise receive. By the same reasoning the legislature could vest the Commission with power to prohibit the use of private passenger automobiles operating on the public highway because such use would be in competition with regulated common carriers of passengers with possible destruction of the business of the latter. Such a result may not be contemplated as within the power of the state and more

particularly within the constitutional powers of the Railroad Commission as defined and limited by this court.

Nor is the action of the Commission authorized by the Public Utilities Act or the Auto Stage and Truck Transportation Act. The power of the Commission to entertain complaints under the Public Utilities Act, under sections 60 and 61a, is with reference to "any act or thing done or omitted to be done by any public utility". Section 7 of the Auto Stage and Truck Transportation Act provides that in all respects in which the Railroad Commission "has power and authority under the Constitution of this state or this act" complaints *may* be filed with the Commission and disposed of "in the manner, under the limitations and with the effect specified in the public utilities act". In *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, this court said at page 578: "By specific reference to the public utilities act the commission is given power to hear and determine complaints against transportation companies in exactly the same manner and to the same extent as it has of complaints against other public utilities. This power is conferred by section 7 of the 'Auto Stage and Truck Transportation Act'. * * * It obviously follows that sections 60 and 61 (a) of the public utilities act, as originally enacted and still in force, which prescribe the power of the commission to hear and determine complaints against public utilities make [mark] and measure the power of the commission to proceed in the instant case." Said section is not

merely procedural. It vests power in the Commission to entertain complaints and to take action thereon. The restrictions and limitations specified in the section are that, for the purpose of procedure, the terms of the Public Utilities Act shall apply.

If the Auto Stage and Truck Transportation Act purports to vest in the Commission jurisdiction over private carriers, in my opinion it is to that extent contrary to the Constitution. Such a conclusion would not deprive the Commission of the power to entertain complaints against transportation companies which are common carriers in fact but are seeking to avoid the requirements of the act by masquerading as private carriers. If the petitioners had been found to be a common carrier in fact, the Commission would have had jurisdiction over them and could have properly exercised its authority in prohibiting their operations. But when the Commission found the petitioners to be a private carrier, and it did so find, the jurisdiction of the Commission over them was at an end. It seems to me that the prevailing opinion has misconceived the real purpose and object of the Auto Stage and Truck Transportation Act. The opinion fails to distinguish between regulation looking to safety and the conservation of the highways and the regulation of persons by whom the highways may be used. As to regulations concerning safety and the conservation of the highways they must be uniform and apply equally as between those similarly situated and may comprehend all uses both public and private. The Motor Vehicle Act is

a familiar example of such regulation. But such an act necessarily prescribed a uniform course of conduct to which all must conform and when its requirements are met must be available to all. Use of the highways under such an act may be regulated, but not prohibited, with certain exceptions not material here. Concerning the regulation of the persons who may use the public highways it is unquestionably true that the state may not only regulate but may prohibit the use thereof by persons, firms or corporations engaged in the business of a common carrier. It may grant the privilege to one carrier and deny it to another. It may regulate the charges and service of a common carrier and it may prevent other common carriers from competing with a privileged carrier. Such is the purpose of the Auto Stage and Truck Transportation Act. In other words, the purpose of the regulatory provision here in question is to prevent, in the public interest, ruinous competition as between concerns engaged in a like public business. With reference to a similar act in the state of Washington the Supreme Court of the United States in *Buck v. Kuykendall,* 267 U. S., said: "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use but the persons by whom the highways may be used." In determining the persons by whom the highways may be used the state has no power, in my judgment, under the guise of prohibiting competition, to deny to its citizens the right to use the public highways for

their own private purposes, whether for business or for pleasure. But assuming that it has that right, and particularly the right to prohibit a private business use of the highways, as announced by the opinion, it would necessarily be true that such regulatory prohibitions must be uniform and apply to all similarly situated and be enforced through the medium of a state agency duly constituted for that purpose. But in this case a state agency whose judicial powers extend only to the regulation and control of public utilities and matters properly germane thereto, proceeds to hale before it a concern using the highways for its own private purposes, its private rights are adjudicated, it is found to be engaged in a private business and it is put out of business because, forsooth, its private business diminishes the revenues of a certificated common carrier. That the Commission acted judicially in determining, after notice and hearing and on evidence, the status of the defendants before it and in issuing the injunction cannot be denied. That the Commission may act judicially when legally authorized so to do is likewise beyond question. Its authority to act in that capacity, however, cannot be determined alone from a consideration of the amendment to the statute in 1919. Such a grant of power must come from the Constitution or from some act of the legislature which is constitutionally authorized. It is not contended, as indeed it may not be, that the Commission has direct grant from the Constitution to regulate private business. True, this court compelled the Commission to assume jurisdic-

tion of transportation companies prior to any legislative enactment on the subject (*Western Association etc. R. R. v. Railroad Comm.,* 173 Cal. 802), but the transportation companies before the Commission in the proceeding involved in that case and over which the Commission was required to take jurisdiction were admittedly common carriers and, as such, public utilities within the definition of section 23, article XII, of the Constitution. The whole purpose of that section and of the preceding section 22 in reestablishing the Railroad Commission and endowing it with extensive powers was to regulate and control public utilities privately owned (*City of Pasadena v. Railroad Commission,* 183 Cal. 526, 534), and it is settled by the decisions of this court beyond question that such additional powers as the legislature may confer upon the Commission must be "germane to the subject of regulation and control of public utilities". (*Pacific T. & T. Co. v. Eshleman,* 166 Cal. 640; *City of Pasadena v. Railroad Comm.,* supra; *Motor Transit Co. v. Railroad Commission,* 189 Cal. 573.) The Commission recognizes that such is the rule, but contends "that the regulation of the type of carriage here in question is, because of its power to destroy regulated carriage, most cognate and germane to the subject of the regulation and control of public utilities [carriers]." I deny that the Commission has power to suppress and destroy a private business because such private business may be in competition with the business of the common carrier. This is, indeed, a curious but nevertheless an effective method

of taking private property for public use without compensation. Furthermore, if the question of competition be the test and the elimination of competition be germane to the subject of regulation and control of the public utility it is difficult to conceive why it is necessary to consider the use of the public highways in connection with such competition, for if the power to suppress competition be possessed by the Commission it may be exercised against the outlawed competitor whether he operate on the public highways or elsewhere. If the suppression of competition alone does not make such regulation germane to the subject of regulation and control of public utilites, then it cannot be made so germane under the guise of regulating the use of the public highways. We are here dealing with public and private concerns which use the public highways in their business, but the fact that they are so using them, in so far as competition is concerned, is a mere circumstance.

The prevailing opinion concedes that the conclusions reached are without direct precedent. By reference to the laws and decisions of other states it is found that Michigan, Ohio, Utah and Washington have statutes similar to our Auto Stage and Truck Transportation Act. The courts of last resort of those states, in construing their statutory provisions, have uniformly reached a conclusion opposed to the prevailing opinion (*Hissen v. Guran et al.,* (Ohio) 146 N. E. 808; *Davis & Banker v. Metcalf,* 131 Wash. 141, 229 Pac. 2; *State v. Nelson,* (Utah) 238 Pac. 237). The declaration of the Supreme Court of the

United States in *Michigan Public Utilities Commission v. Duke,* 266 U. S. 570, is directly in point. In that case Duke had employed 75 men and 47 motor trucks as a private carrier under three private contracts for the transportation of automobile bodies from Detroit to Toledo. Under the Public Utilities Act of Michigan, which concededly is essentially similar to our own Auto Stage and Truck Transportation Act, it was sought to subject Duke to regulation as a common carrier. The court said: "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the fourteenth amendment. (*Producers Transportation Co. v. Railroad Commission,* 251 U. S. 228, 230; *Wolff Co. v. Industrial Court,* 262 U. S. 522, 536. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property in violation of that clause of the constitution." The prevailing opinion attempts to distinguish that case from the one at bar on the ground that Duke's contracts were outstanding at the time the Michigan statute took effect and for that reason the statute was not applicable to him. The Supreme Court of the United States did not base its decision on the impairment of contract clause, but on the fourteenth amendment. Such in my opinion should be the conclusion reached in this case, that

is to say, it should be decided that the petitioners, by reason of the act of the Commission, have been deprived of their property without due process of law, have been denied the equal protection of the law, and their private property has been taken for public use without just or any compensation. The order of the Railroad Commission should be annulled.

SHENK, J.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 828

MARION L. FROST and WESLEY H. FROST, co-partners,
Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CARL I. WHEAT,
State Building, San Francisco,
Attorney for Defendant in Error, Railroad Commission of the State of California.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 828

MARION L. FROST and WESLEY H. FROST, co-partners,
Plaintiffs in Error,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I.

THE FACTS.

The facts involved in the present case are of extreme simplicity and are here briefly presented in tabloid form:

The Statutory Background.

In 1917 the California Legislature enacted the so-called "Auto Stage and Truck Transportation Act" (Statutes 1917, Chapter 213), by which the State Rail-

road Commission was given broad regulatory powers over common carriers by automobile of persons or property for compensation over the highways where the operation was conducted between fixed termini or over regular routes. In 1919 the Legislature amended this statute (Statutes 1919, Chapter 280), by adding words which admittedly purport to bring under regulation by the Railroad Commission not only the above mentioned common carriers, but also automotive carriers of persons or property operating under private contracts of carriage. Under this statute "transportation companies" by automobile were to be subjected to regulation, and the term "transportation company" was defined to include both of these types of carriers. It was specifically provided that no such "transportation company" should operate for compensation over the highways without first having secured from the Commission a certificate of public convenience and necessity so to do.

The Case Before the Railroad Commission.

One Happe, a certificated common carrier of goods by auto truck, complained against Frost and Frost, the present plaintiffs in error, alleging that they were operating as a "transportation company" in violation of this statute. (Trans. pp. 4 to 9.) A hearing was held, at which it appeared that Frost and Frost were, in fact, operating motor trucks for the transportation of property for compensation over certain public highways between fixed termini and over a regular route under a private contract of carriage. The Commission found that they were operating a "transportation company", as defined in the statute, and the

order was that they must cease and desist from such operation

> "unless and until they shall have secured from the Commission a certificate that public convenience and necessity require the resumption or continuance thereof." (Trans. p. 20.)

The State Supreme Court's Decision.

Upon writ of review, the State Supreme Court affirmed this order of the Commission, holding (1) that such private contract carriers upon the public highways might be subjected to reasonable regulation by the State without violation of constitutional rights; (2) that, under the Constitution and laws of California, such regulation might properly be exercised through the existing Railroad Commission, and (3) that the State Legislature had, in fact, placed the duty of effecting such regulation upon that body. Obviously, only the first of these is at issue here.

The Court expressly declared that the statute in question "does not and cannot" have the effect of transmuting a private contract carrier into a common carrier against his will, and we cannot make too clear the fact that there never has been and is not now any attempt of any nature, whatsoever, to force such carriers into the category of common carriers, or to force them to dedicate any of their property to public use, notwithstanding the innuendo to that effect which runs through much of plaintiffs in error's brief. The sole purpose of the State in enacting this legislation, and of the Railroad Commission in enforcing the same, is to impress upon such private carriers certain regulations so long as they desire to use the publicly

built and owned highways as the chief situs of their *business* of hauling goods for compensation. *We admit that they are not, and cannot be forced, directly or indirectly, to become common carriers.*

II.

THE QUESTION.

The sole question to be determined here is, therefore, whether the requirement by a State that such a private contract carrier obtain a certificate before operating automobile trucks *in the business of hauling property for compensation over the public highways* violates either the due process or the equal protection clauses of the Federal Constitution.

There is no question here of arbitrary discrimination against these plaintiffs in error, for they have not as yet applied for a certificate to cover operations of the nature proposed by them, and the sole ruling of the Railroad Commission was that they should not so operate unless and until they had secured such a certificate. If, upon proper application, the Railroad Commission had arbitrarily denied them the certificate in question, a totally different problem would be presented to this Court.

Nor are we in this case concerned with any of the other provisions of this statute. Some may and some may not be applicable to such carriers. We reiterate that the *sole question here* is whether or not a State may require of one who desires to use its public highways as the chief and paramount situs of his *private*

haulage business to come to some State agency and obtain a certificate so to do.

III.

THE STATE COURT'S DECISION SHOULD BE SUSTAINED.

The reasoning upon which the California Supreme Court based its opinion that this order of the Railroad Commission violated none of these plaintiffs' Federal constitutional rights is based upon the premise that, while the public highways of the State are open and free to all persons for traverse and communication at all times, nevertheless, the State may properly impose reasonable conditions and regulations upon any particular individuals who desire to use such publicly constructed and maintained highways *as the chief situs of their business of transporting persons or property thereover as a business for hire*—whether such use be in the nature of common carriage or otherwise. While this is unquestionably a case of first impression, we believe that this reasoning of the State Court is sustainable upon grounds both of law and of logic.

Plaintiffs in error present for consideration the following purported dilemma. Say they, in effect: (1) If they apply for a certificate under this statute and—after due notice, hearing, opportunity to present testimony, and formal findings—it is *denied,* they are deprived of the right (which they claim to be inviolate) of transporting property in their trucks over the public highways for hire under private con-

tracts; whereas, (2) if they apply for a certificate and it is *granted*, they will be subjected to regulations which, say they, would, in effect, force them into the business of common carriage. Both of these results they urge to be unconstitutional.

This second proposition we believe has already been met. There has been no attempt here, either by Legislature or Commission, to make these persons unwillingly assume the status of common carriers. They are not, in fact, nor in effect, to be made to assume such status. Most of the many cases cited by counsel for plaintiffs go off on the point that there has been an attempt to do this, and throughout their brief there appear statements which seem to suggest that this was attempted here. Thus, on page 36 of their brief, counsel quote from the argument of the State in the case of *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445, to the effect that it is competent for the Legislature "to require those who at the passage of the Act are engaged or thereafter engage in motor vehicle transportation for hire on the public highways to do that business *as common carriers*", and counsel add:

> "That is the very argument on which the *Frost* decision is based."

We submit that the most cursory reading of the decision of the State Court in this case discloses that nothing could be farther from the fact. Plaintiffs were and are admitted to be private rather than common carriers, and plaintiffs cannot now by these statements and innuendo, force upon defendants a

contention that is not only not made, but has all along been, and is now expressly admitted to be unsound. The regulation sought to be imposed upon them is not as *common carriers,* but as *carriers for hire by private contract.* Every statement in their brief hinting that either in fact or in effect, directly or indirectly, they are to be made to become common carriers is thus negatived. Neither by the statute nor by this decision are they compelled or even urged, to dedicate any of their properties to public use. Under this statute all private carriers may continue to exist as private carriers. They are not obliged to serve or undertake to serve the public generally, and assuredly no such private carrier could be said to have devoted his properties to public use or to have been forced to become a common carrier when he is under no duty to serve the public generally. We trust that this will settle this contention.

In this connection plaintiffs have been at great pains to analyze certain provisions of the California Auto Stage and Truck Transportation Act which they claim can logically be applied only to common carriers. We respectfully submit that the applicability of these provisions is not now before this Court for consideration or determination. The portion of this statute here involved, and the only portion here involved, is that which requires every "transportation company" to secure a certificate of public convenience and necessity before operating auto trucks for hire over the public highways. Plaintiffs were ordered to cease and desist from their operations unless and until *that provision* had been complied with. We

shall meet the question of the applicability of the other provisions of the Act to non-common carrier operators when those questions arise.

So much for the second horn of plaintiffs' purported dilemma.

* * * * * * *

The first horn of this dilemma merits, however, somewhat more extended consideration. It should, of course, be recalled that as yet plaintiffs have made no application for a certificate, relying solely upon their contention that the State cannot require anything of this sort from a non-common carrier. To require them even to ask for such a certificate will, say they, take from them property without due process of law, and will deny to them the equal protection of the laws.

Plaintiffs' position is predicated upon their assumption that they and all other persons possess an inherent and unqualified right not merely to traverse the public highways, but also to make of those highways the main situs or instrumentality of their *business of hauling goods for hire*. And this, say they, must be without let, hindrance or regulation on the part of the State save as all automotive vehicles may be required to be licensed, and all automobile operators may be required to provide their vehicles with proper lights, brakes and other safety devices. In other words, they urge (1) that the fact that they are so using the publicly built and maintained highways as their main place of business cannot be considered by any reasonable person as placing them in

a different category from those persons who merely use the highways for traverse; and (2) that even if constitutionally classifiable as different in kind from such persons, they cannot be subjected to the necessity of obtaining a certificate to carry on their highway transportation business.

The first postulate is quickly answered. If there be a logical or inherent distinction in kind the classification is sustainable. And we submit that the very statement of the point carries with it its own answer. *Of course there is a difference in kind* between the man who, as a mere incident to his business, transports his own property over the highways, and the man who makes of those highways the main instrumentality of his hauling business. Indeed, the distinction is much like that between the merchant whose store abuts upon the public sidewalk and the itinerant vendor or peddler, who uses that sidewalk as the situs of his business. No question as to common carriage or public utility status is raised there, and the Courts have always recognized the logical distinction there plainly to be seen, the vendor who uses the public streets being everywhere subject to special and distinct regulation.[1] We respectfully submit that the distinction is equally clear in the present instance. It is not a question of status as a common carrier, but of making use of the public highways for private hauling business.

As the State Court said in this very case, no person can be said to have a vested right to make use of the

(1) See, for example, *Ex parte Crowder*, 171 Fed. 250 (1909); *In re Gilstrap*, 171 Cal. 108 (1915), and *Ex parte Hogg*, 70 Tex. Crim. 161, 156 S. W. 931.

public highways as the situs of his business. That is a privilege to which "no one is entitled as of right". We respectfully call to this Court's attention the numerous decisions cited upon this point in the decision of the Court below (Tr. p. 79), and in particular to the apt language of Mr. Justice Sutherland in the case of *Packard v. Banton*, 264 U. S. 140; 68 L. ed. 596 (1923) in which it was declared that

> "The streets belong to the public, and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature may see fit."

We submit that this reasoning of this tribunal coincides precisely with that of the State Court in the present instance. As that Court said, this is a conditional offer of an unusual privilege,—i. e., the privilege of using the public highways in a "special and extraordinary" manner as the main situs of business, —and, as such, any persons desiring to avail themselves of this privilege must submit to the condition.

The development of modern paved highways—itself the result of the automobile—has within a generation opened up a field of business hitherto non-existent. In the interest of the public at large, which at enormous expense builds and maintains these highways, it has been found essential to impose regulations upon those who use these new instrumentalities of communication. First came the licensing of automobiles and their operators, and the enactment of general safety and weight provisions. These acts have been

broadly sustained in every State. But as the use of the automobile developed—as the life of whole communities was transformed by this new mode of locomotion which has made its way by its very elasticity and economy into every hamlet—as the network of broad, well built highways (unknown and unnecessary in the days of the horse and buggy) rapidly extended itself from town to town and far out into the farming areas—as these new factors came into being, there grew up a new and potent form of business,—the transportation of persons and property by automobile over these highways. The first result of this development was that most of the short line steam and electric railroads of the country went into bankruptcy. The second was that an insistent demand arose for some regulation of this new form of business.

In California this demand was so strong that, against the strenuous opposition of the State Railroad Commission, the California Supreme Court, upon petition by the short line railroads of the State, directed and ordered the Commission to assume jurisdiction over automotive carriers under a provision of the State Constitution adopted a quarter of a century before automobiles were invented.[2] The next year, again at the behest of the short line railroads, the Legislature passed a comprehensive statute providing for the regulation of "transportation companies" by automobile, including in that term all

(2) *Western Association of Short Line RRs. v. Railroad Commission*, 1916, 173 Cal. 802; 162 Pac. 391:

The constitutional provision in question had originally been adopted in 1879, and gave to the Railroad Commission certain regulatory authority over "railroads and other transportation companies", which latter term the State Court held to include automobile carriers.

common carriers of persons or property between fixed termini or over regular routes. This regulation of automotive and common carriers was broadly sustained by the State Supreme Court as a proper exercise of the State's underlying and fundamental sovereign authority (commonly termed the "police power") upon the theory that it was a proper regulation of private acts and conduct in the interest of the general public good, the Court saying:

> "The primary purpose of the legislature in enacting this statute was not to confer a franchise upon the operating companies but to give into the power of the commission for regulation and control in the interest of the public the operation of auto stages for transportation."[3]

In their petition for rehearing before the State Court herein, plaintiffs aptly said that with the progress of time,

> "Steam railroads began to be constructed and attempted to construct their tracks on, along and across the public highways. Then came street railroads, first drawn by horses and later propelled by electricity, and then came interurban electric railroads. In order to take care of these situations and to protect the public in the use of the highways, there was established, as an exception to the general rule, the proposition that as to common carriers, the State might prevent the use of the public highways or, if it was willing that they should be used by such common carriers, it might establish such reasonable conditions as might be in the public interest."

---

(3) *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573 (at p. 585). See also *Coast Truck Line v. Railroad Commission*, 191 Cal. 257.

To which we added in our answer to the petition:

> "With the further progress of time, however, automobiles and motor trucks came into use and their operators began to utilize the public highways as the main agency both of common carriage and of private business. It thus became necessary to protect the public interest further by extending the exception to the general rule so as to include, in addition to common carriers, all those who utilize the public highways as the main instrumentality for their private gain."

The Chapter was, therefore, incomplete, and in 1919, the California Legislature, realizing that its former Act was inadequate in scope, and that the public interest demanded such further action to bring under reasonable regulation the increasing number of persons who had not held themselves out as common carriers but who nevertheless were using the public highways as the main situs,—indeed as the only situs of *their business of hauling for hire*,—amended the statute which had formerly covered common carriers alone to bring such private carriers under regulation. And this was done in aid of the commonweal—in order that all who use these public highways as a business for hire between fixed termini or over regular routes might be subjected to a proper public control, not for the purpose of suppressing competition but for the purpose of upholding the public interest in proper and continuous service, and the proper exercise of the special privilege of using the public highways as a place of business.

This whole claim of "private contract" rights is illusory. In the present instance there was but one

such contract, but in the *Holmes* case, the decision in which is appended to plaintiff's brief, there were twenty-three, and we suppose that under plaintiff's theory there might well be a thousand—the camouflage being thus indefinitely maintained. Somewhere, somehow there must, in any event, be an end to this play of "private contracts", and whatever may be determined as to this one-contract hauler, we respectfully call to the Court's attention the necessity of avoiding any protection to mere subterfuge, resorted to in order to escape proper public regulation. The *Holmes* case, we submit, clearly points to the danger to public control which is involved in this matter.

IV.

PLAINTIFFS' ALLEGED "AUTHORITIES".

Plaintiffs admit this case to be one of first impression, but—strangely enough—add that the California Court's decision is mostly "argument", and then proceed to cite a number of cases from other States which they urge as determinative of the very point herein involved. Were it not for this suggestion as to these cases we would be disposed to omit mention of them here, but we feel that in justice to the Court we should briefly point out that in none of them was there decided the question here presented.

In the *Duke Cartage* case (*Michigan Public Utilities Commission v. Duke*, 266 U. S. 570), no question arose as to the regulation of private contract haulage business. As was clearly pointed out by the California Supreme Court in the decision here under appeal,

the State of Michigan attempted in that case to place this hauler, as well as other contract haulers, in the category of common carriers, an attempt which we freely admit to be unlawful. That the State of Michigan rested its argument upon its alleged right to force such carriers to become common carriers, is shown in the quotation included on page thirty-six of plaintiffs' brief herein, wherein it is shown that the attorney general of Michigan definitely argued that it was competent for the Legislature of a State to require such operators "*to do that business as common carriers*". There is no attempt in the present instance thus to force any one to dedicate his property to public use.

The case of *Davis v. Metcalf,* 1924 (131 Wash. 141; 229 Pac. 2) is of no greater authority for the position here taken by plaintiffs in error, nor did that decision overrule the cases of *State v. Price,* 210 Pac. 787, and *Davis v. Nickell,* 218 Pac. 198, which definitely upheld the position now taken by the California Supreme Court. We have no quarrel with the statement of the Washington Court quoted in plaintiffs' brief at page forty-one, to the effect that the Court should be slow to hold that the State could exclude the owners of property from carrying it over the highways "either personally, or by agent, or by an independent contract", but this statement bears no relation to the argument of plaintiffs in the present case. It refers to a prohibition placed on the owner of goods,—it has nothing to do with the right of the State to control and regulate the *business* of one who holds himself out as a contract carrier of property by automobile

truck over the highways of the State for others. *It is the use of the highways as the chief—and indeed the only—sense of business which gives to the State the authority to regulate such carriage*, and it should, moreover, be pointed out that in the California statute the intent of the legislature to regulate this type of transportation is much clearer and more definite than that of the Washington statute (cited on page forty of plaintiffs' brief), and although that statute is admittedly broad enough to allow an interpretation including private as well as common carriers within the definition of an "auto transportation company", it would not have been at all surprising had the Washington Court not done so.

The Utah decision of *State v. Nelson*, 238 Pac. 237, (cited and discussed in plaintiffs' brief beginning at page forty-three), involves the consideration of a statute which, like that of Michigan, attempted to force private contract carriers to become common carriers over the highways, and as shown on page forty-five of plaintiffs' brief, the Utah Court construed that statute as applicable only to common carriers, stating that which we all admit, to-wit: that the State cannot by mere legislative fiat or edict, or by regulating orders of a Commission, "convert mere private contracts of a mere private business into a public utility or make its owner a common carrier". It is quite evident that, in the opinion of the Utah Supreme Court, the attempt of the Legislature of that State was not to impose regulations upon those carriers as private contract carriers over the highways, but

to force them by legislative fiat to become common carriers.

The Ohio statute referred to in the case of *Wissem v. Evans*, et al., 112 Ohio State 30; 146 N. E. 808, is of like import. Section 6112 of the Ohio General Code provides that any persons engaged in the business of carrying or transporting persons or property or both

> "in motor propelled vehicles of any kind what-soever, for hire over any public street, road or highway in this State * * * is a motor transportation company, and as such is declared to be a common carrier".

No further comment is necessary upon the Ohio decision.

It becomes apparent, therefore, that the statutes of the other States from which plaintiffs cite the above mentioned "authorities" are all much narrower in their scope than is the California statute, and that all of them attempt by mere legislative decree to compel common carriage. This is not true in the California statute, and we again call to the attention of the Court the fact, admitted by plaintiffs, that this is in truth a case of first impression.

* * * * * * *

In conclusion, we wish to urge the necessity for this tribunal to recognize here, as in other types of cases, the importance of an elastic and expansive development of the law to meet new and changing conditions. As to this we can hardly do better than to quote from another recent decision of the California Court which in our opinion excellently expresses this fundamental

and important feature of our law. In discussing the underlying power of sovereignty—often rather inaptly termed the "police power"—that Court declared that it is apparent that such power,

> "is not a circumscribed prerogative, but is elastic [illegible] which 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power' (*Streich v. Board of Education*, 147 N. W. 779), and that power 'may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare' (*Noble State Bank v. Haskell*, 219 U. S. 104)."[1]

In this proceeding the Court is called upon to review a statute enacted by a State under this underlying power. Only in the event the statute is found to be unreasonable or arbitrary should it be held to be in violation of the Constitution of the United States.

---

(1) *Miller v. Board of Public Works*, 69 Cal. Dec. 215.

A recent statement of this doctrine which, though it is included in a dissent, would, we believe, be subscribed to by all members of this Court, is contained in Mr. Justice Brandeis' opinion in *Truax v. Corrigan*, 257 U. S. 312, [illegible]

> [illegible] public need, is, necessarily, largely a matter of judgment."

We respectfully submit that the regulatory measures prescribed in the California Auto Stage and Truck Transportation Act cannot be said to be unreasonable or arbitrary, and we urge that this is particularly true of the requirement of a certificate before commencing operations. When the magnitude of the problem of present and future regulation of motor transportation in the various States is borne in mind, we believe that the wisdom as well as the lawfulness of this action on the part of the State will be apparent. Regulation of all carriers for hire over the public highways, both common carriers and private carriers, has become imperative in the various States, and the indispensability of such regulation is becoming more and more accentuated with the rapid growth of this relatively new method of transportation.

We have not overlooked a certain tendency on the part of this Honorable Tribunal to call a halt upon over-regulation by the States, and the present defendant has not found itself without considerable sympathy with this tendency. We desire, however, to call to the Court's attention the fact that this tendency has been apparent largely in cases arising under the Commerce Clause (as in the *Duke* case, supra, and the *Buck* case, 307 U. S. 307, 69 L. ed. 623), rather than in cases involving merely general complaints under the clauses guaranteeing due process and equal protection where intrastate affairs alone were in question.

This Court, we submit, should be slow, indeed, to hold invalid upon such grounds as those urged by these plaintiffs the studied and deliberate action of a State, supported by the careful and well considered

determination of that State's Supreme Court that such action is in the public interest. Every intendment should be in favor of the statute.

And this is particularly true in the present case in which, as we have pointed out above, a decision adverse to that of the State Court would be tantamount to a reversal of the attitude announced by this Court in the case of *Packard v. Banton*, supra, in which the fundamental doctrine of the right of a State to control the use of its public highways for private gain was so clearly and succinctly declared.

Dated, San Francisco,
April 3, 1926.

Respectfully submitted,
CARL I. WHEAT,
Attorney for Defendant in Error,
Railroad Commission of the
State of California.

SUPREME COURT OF THE UNITED STATES.

No. 828.—October Term, 1925.

Marion L. Frost and Wesley H. Frost, co-partners, doing business under the name and style of Frost & Frost Trucking Company, Plaintiffs in Error, *vs.* Railroad Commission of the State of California.	In Error to the Supreme Court of the State of California.

[June 7, 1926.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case involves the constitutional validity of the Auto. Stage and Truck Transportation Act of California, c. 213, Statutes of California, 1917, p. 330, as construed and applied to plaintiffs in error by the state supreme court. The specific challenge is that, as so construed and applied, it takes their property for public use without just compensation, deprives them of their property without due process of law, and denies them the equal protection of the laws, in violation of the Fourteenth Amendment to the federal Constitution. The act provides for the supervision and regulation of transportation for compensation over public highways by automobiles, auto trucks, etc., by the railroad commission. The term "transportation company" is defined to mean a common carrier for compensation over any public highway between fixed termini or over a regular route. By § 3, no corporation or person is permitted to operate any automobile, auto truck, etc., "for the transportation of persons or property as a common carrier for compensation on any public highway in this state between any fixed termini . . . unless a permit has first been secured as herein provided." Permits are issued upon application by the incorporated city or town, city and county, or county within or through which the applicant intends to operate. By § 4, the railroad commission is empowered

to supervise and regulate such transportation companies and to fix their rates, fares, charges, classifications, rules and regulations, and, generally, to regulate them in all matters affecting their relationship with the traveling and shipping public. Section 5 requires, in addition to the permit, that the applicant must obtain from the railroad commission a certificate declaring that public convenience and necessity require the exercise of such right or privilege; and it provides that the commission may attach to the exercise of the rights granted such terms and conditions as in its judgment the public convenience and necessity may require. Operation under a permit without such certificate is prohibited. In 1919, the act was amended, Statutes 1919, c. 280, p. 457, so as to bring under the regulative control of the commission automotive carriers of persons or property operating under private contracts of carriage; and the term "transportation company" was enlarged so as to include such a carrier. It was further provided that no such transportation company shall operate for compensation over the highways without first having secured from the commission a certificate of public convenience and necessity so to do.

Plaintiffs in error were engaged under a single private contract in transporting, for stipulated compensation, citrus fruit over the public highways between fixed termini. They were brought before the commission charged with violating the act, for the reason that they had not secured from the commission a certificate of public convenience and necessity. The commission, while agreeing that plaintiffs in error were, in fact, private carriers, held that they were subject to the provisions of the act and directed them to suspend their operations under their contract unless and until they should secure a certificate that public convenience and necessity required the resumption or continuance thereof. The commission's order was upheld by the state supreme court. 70 Cal. Dec. 457.

On behalf of plaintiffs in error the contention is that, in its application to private carriers, the act has the effect of transforming them into public carriers by legislative fiat. Upon the other side it is said that the sole purpose of the legislation "is to impress upon such private carriers certain regulations so long as they desire to use the publicly built and owned highways as the chief situs of their business of hauling goods for compensation," and that

"they are not, and cannot be, forced, directly or indirectly, to become common carriers."

It is unnecessary to inquire which view is correct, since the act has been authoritatively construed by the state supreme court. That court, while saying that the state was without power, by mere legislative fiat or even by constitutional enactment, to transmute a private carrier into a public carrier, declared that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon; and that, therefore, the legislature might grant the right on such conditions as it saw fit to impose. In the light of this general statement of principle, it was held that the effect of the transportation act is to offer a special privilege of using the public highways to the private carrier for compensation upon condition that he shall dedicate his property to the quasi-public use of public transportation; that the private carrier is not obliged to submit himself to the condition, but, if he does not, he is not entitled to the privilege of using the highways.

It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed. 70 Cal. Dec. pp. 464-465, 466.

Thus, it will be seen that, under the act as construed by the state court, whose construction is binding upon us, a private carrier may avail himself of the use of the highways only upon condition that he dedicate his property to the business of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers. In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission. The certificate of public con-

venience, required by § 5, is exacted of a common carrier and is purely incidental to that status. The requirement does not apply to a private carrier *qua* private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist.

That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in *Michigan Commission* v. *Duke*, 266 U. S. 570, 577-578. See also, *Hissem* v. *Guran*, 112 O. S. 59; *State* v. *Nelson*, 65 Utah 457, 462. The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend.

There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other —the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to

strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

The prior decisions of this court amply justify this conclusion. In *Paul* v. *Virginia*, 8 Wall. 168, 181, the rule was stated to be that the state, having the power to exclude foreign corporations from its limits, may admit them upon such terms and conditions as the state may think proper to impose. But in *Insurance Company* v. *Morse*, 20 Wall. 445, 456, it was said that this sweeping language must be understood with reference to the facts of that case; and that it could not be extended to include conditions repugnant to the Constitution and laws of the United States. In *Barron* v. *Burnside*, 121 U. S. 186, 197, this limitation was expressly reaffirmed. Mr. Justice Blatchford, speaking for the court, said (p. 200):

"The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. La Fayette Ins. Co. *v.* French, 18 How. 404, 407; Ducat *v.* Chicago, 10 Wall. 410, 415; Ins. Co. *v.* Morse, 20 Wall. 445, 456; St. Clair *v.* Cox, 106 U. S. 350, 356; Phila. Fire Assn. *v.* New York, 119 U. S. 110, 120."

In *Southern Pacific Company* v. *Denton*, 146 U. S. 202, 207, there was under consideration a Texas statute requiring a foreign

corporation desiring to do business in the state, to agree that it would not remove any suit from a court of the state into the circuit court of the United States. This court held the statute invalid, saying:

"But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

After the *Denton* case, came *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246. That decision purported to follow the case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, and to differentiate *Barron* v. *Burnside*, *supra;* and it was thought to have materially modified the rule laid down in the *Morse*, *Burnside* and *Denton* cases. But however this may be, both the *Prewitt* and *Doyle* cases have been quite recently overruled, and the views of the minority therein expressed declared to be now the law of this court. *Terral* v. *Burke Constr. Co.*, 257 U. S. 529, 533. In the light of this declaration, these dissenting views become pertinent and controlling. In the *Doyle* case, Mr. Justice Bradley, speaking for the minority, said (pp. 543, 544):

"Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister States; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a State is unwise enough to legislate the one, it has no constitutional power to legislate the other. . . .

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

In the *Prewitt* case, Mr. Justice Day, dissenting, said (pp. 267-269):

"In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do

business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. . . .

". . . While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

"In the cases decided in this court subsequently to Barron *v.* Burnside, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution."

In *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 34-48, upon a full review of the prior decisions, the principle set forth in the foregoing quotations was again reaffirmed. That case involved the validity of a Kansas statute which provided that a corporation of another state, though engaged in interstate business, must, as a condition of doing local business, pay to the state certain graduated percentages of its capital stock. It was held that this requirement operated as a burden on the interstate business of the company, in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the state, in violation of the due process of law clause; that, thus, it was vio-

lative of the constitutional rights of the company; and that the right of the company to continue to do business in Kansas was not and could not be affected by the condition. The general principle was again announced in the following words (pp. 47-48):

"The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution."

Since that decision, the same principle has been reiterated many times and never departed from. *Pullman Co. v. Kansas*, 216 U. S. 56, 68; *International Textbook Co. v. Pigg*, 217 U. S. 91; *Herndon v. Chi., Rock Island & Pac. Ry.*, 218 U. S. 135, 158; *Harrison v. St. L. & San Francisco R. R.*, 232 U. S. 318, 332; *Looney v. Crane Co.*, 245 U. S. 178, 187; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 142-143; *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 114; *Public Utility Commrs. v. Fuchsault & Co.*, 261 U. S. 401, 404; *Ferrell v. Burke County Co.*, *supra*; *Bacnes Natl. Bank v. Duncan*, 265 U. S. 17, 24; *Fidelity and Deposit Co. of Maryland v. Tafoya et al.*, — U. S. — (decided March 15, 1926).

And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it. In *Western Union Tel. Co. v. Foster*, *supra*, two telegraph companies were engaged in transmitting the quotations of the New York Stock Exchange among the states. This was held to be interstate commerce, and an order of the Public Service Commission of Massachusetts, requiring the companies to remove a discrimination, was held to infringe their constitutional rights. One of the grounds upon which the order was defended was that it rested upon the power of the state over the streets which it was necessary for the telegraph to cross. That contention was answered broadly (p. 114):

"But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would

not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States *v.* Reading Co., 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1. Pullman Co. *v.* Kansas, 216 U. S. 56. Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 203. The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified 'under that somewhat ambiguous term of police powers.' ''

And, in almost the last expression of this court upon the subject, *Burnes Natl. Bank* v. *Duncan, supra,* the rule is none the less broadly but more succinctly stated to be (p. 24):

''The States cannot use their most characteristic powers to reach unconstitutional results. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1. Pullman Co. *v.* Kansas, 216 U. S. 56. Western Union Telegraph Co. *v.* Foster, 247 U. S. 105, 114.''

We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment; and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed. *Western Union Tel. Co. v. Kansas, supra,* p. 48.

The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly.

Judgment reversed.

A true copy.

Test

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 828.—October Term, 1925.

Marion L. Frost and Wesley H. Frost, co-partners, under the style of Frost & Frost Trucking Company, Plaintiffs in Error,
vs.
Railroad Commission of the State of California.

In Error to the Supreme Court of the State of California.

[June 7, 1926.]

Mr. Justice Holmes, dissenting.

The question is whether a State may require all corporations or persons, with immaterial exceptions, who operate automobiles, &c., for the transportation of persons or property over a regular route and between fixed termini on the public highways of the State, for compensation, to obtain a certificate from the railroad commission that public necessity and convenience require such operation. A fee has to be paid for this certificate and transportation companies are made subject to the power of the railroad commission to regulate their rates, accounts and service. The provisions on this last point are immaterial here, as the case arises upon an order of the commission under § 5 that the plaintiffs in error desist from transportation of property as above unless and until they obtain the certificate required, and by the terms of the statute every section and claim in it is independent of the validity of all the rest. § 10. Whatever the Supreme Court of California may have intimated, the only point that it decided, because that was the only question before it, was that the order of the commission should stand.

This portion of the act is to be considered with reference to the reasons that may have induced the legislature to pass it, for if a warrant can be found in such reasons they must be presumed to

have been the ground. I agree, of course, with the cases cited by my brother Sutherland, to which may be added *American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U. S. 350, 358, that even generally lawful acts or conditions may become unlawful when done or imposed to accomplish an unlawful end. But that is only the converse of the proposition that acts in other circumstances unlawful may be justified by the purpose for which they are done. This applies to acts of the legislature as well as to the doings of private parties. The only valuable significance of the much abused phrase police power is this power of the State to limit what otherwise would be rights having a pecuniary value, when a predominant public interest requires the restraint. The power of the State is limited in its turn by the constitutional guaranties of private rights, and it often is a delicate matter to decide which interest preponderates and how far the State may go without making compensation. The line cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts. Extreme cases on the one side and on the other are *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, and *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

The point before us seems to me well within the legislative power. We all know what serious problems the automobile has introduced. The difficulties of keeping the streets reasonably clear for travel and for traffic are very great. If a State speaking through its legislature should think that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt that it constitutionally could, as, I presume, most States or cities do, exercise some such control. The only question is how far it can go. I see nothing to prevent its going to the point of requiring a license and bringing the whole business under the control of a railroad commission so far as to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them. I see nothing in this act that would require private carriers to become common carriers but if there were such a requirement, it, like the provisions concerning rates and accounts, would not be before us now, since, as I have said, the statute makes every section independent and declares that if valid it shall stand

even if all the others fall. As to what is before us, I see no great difference between requiring a certificate and requiring a bond as in *Packard* v. *Banton,* 264 U. S. 140, and although, as I have said, I do not get much help from general propositions in a case of this sort, I cannot forbear quoting what seems to me applicable here. Distinguishing between activities that may be engaged in as a matter of right and those like the use of the streets that are carried on by government permission, it is said: "In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former." 264 U. S. 145. I think that the judgment should be affirmed.

Mr. Justice BRANDEIS concurs in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 828.—October Term, 1925.

Marion L. Frost and Wesley H. Frost, copartners, doing business under the name and style of Frost & Frost Trucking Company, plaintiffs in error, *vs.* Railroad Commission of the State of California.	In Error to the Supreme Court of the State of California.

[June 7, 1926.]

The separate opinion of Mr. Justice McReynolds.

Our primary concern is with the decree below—not with the reasons there advanced to support it. I suppose, if that court had simply approved the action of the Railroad Commission and had said nothing more, there would be little, if any, difficulty here in finding adequate ground for affirmance.

The questions involved relate solely to matters of intrastate commerce. No complication arises by reason of the power of Congress to regulate interstate commerce. Having built and paid for the roads, California certainly has the general power of control. Plaintiffs in error are without constitutional right to appropriate highways to their own private business as carriers for hire. And if, in so many words, the Legislature had said that no intrastate carriers for hire except public ones shall be permitted to operate over the state roads it would have violated no federal law. So far as the rights of plaintiffs in error are affected, nothing more serious than that has been done.

The States are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the federal Constitution.

I think the decree of the court below should be affirmed.